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The Criminalization of Cyberbullying Among Children and Youth

By Liat Franco & Khalid Ghanayim

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**The Criminalization of Cyberbullying Among
Children and Youth**

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Abstract

This article provides the data necessary for molding an appropriate public policy that would address aggressive behavior among children in the digital domain as it provides relevant background information on the phenomenon, maps the available existing legal models, and suggests the reframing of these tools with a view to mitigate cyberbullying. This article creates a new model which is based on the formulation of three “aggravating categories” that will help in classifying those violent online behaviors that constitute acts that merit and justify criminalization. These are the degree of sexuality, the degree of intensity, and the degree of violence associated with the harmful communication, with a mere one of the three sufficing for the application of the criminal offense. The objective of these aggravating categories is to allow us, and all those involved in the chain of criminalization (enforcement agencies included) to distinguish between morally tainted behaviors that should not be criminalized, and which need to be treated extra-criminally and occasionally extra-judicially by the key players that surround children (such as the education system and the children’s parents), and anti-social behaviors that inflict severe harms on social values and thus necessitate some form of legal response.

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Introduction

January 2013 witnessed the suicide of Carolina Picchio – a 14-year-old girl from Northern Italy – after a long period of cyberbullying.¹ More specifically, it was the distribution of a compromising video over social networks by her former boyfriend that sparked a wave of online violence against her, depicting Picchio in a drunk and confused state. On the day of her suicide, Picchio received some 2,600 denigrating and disparaging messages via WhatsApp.² In May 2013, the Italian prosecutor announced that 8 boys aged 13-17 would be indicted for various charges pertaining to Picchio's death.³ At about the same time, the AGE (Associazione Italiana Genitori – The Italian Parents' Association) decided to press charges against Facebook in Rome, claiming that the social network "played an active part in the girl's suicide,"⁴ and in July 2013, an Italian Prosecutor announced that he intended to file a lawsuit against Facebook for not removing the offensive content despite being requested to do so multiple times by both Picchio herself as well as her family and friends.⁵ The particulars of these lawsuits are unknown⁶, but what is clear is that this case raises many questions concerning the limits of criminal liability, both on the part of the boys who committed the harm as well as on the part of the social networks which served as the publication and distribution platforms for the harmful and offensive messages Picchio received. It further raises questions concerning, among other things, the universal aspects of children rights, and the duties of educators and parents in preventing or reducing the occurrence of such cases.

As time elapses extreme forms of cyberbullying surface and exemplify how social networks may be used as platforms for hosting deviant behaviors that continuously evolve

¹ Ben Wedeman, *Facebook May Face Prosecution Over Bullied Teenager's Suicide in Italy*, CNN BREAKING NEWS (July 31, 2013), <http://edition.cnn.com/2013/07/31/world/europe/italy-facebook-suicide>.

² *Id.*

³ *Id.*

⁴ Sheniz Raif, *Facebook Investigated by Italian Police After Girl, 14, Commits Suicide Because of Bullying!*, BUZZ PATROL (May 29, 2013), <http://www.buzzpatrol.com/facebook-investigated-suicide-bullying>.

⁵ Christina Sterbenz, *Prosecutor May File a Criminal Complaint Against Facebook Over 14-year-old's Suicide*, BUSINESS INSIDER (July 31, 2013), <https://www.businessinsider.com/facebook-may-face-a-lawsuit-after-carolina-picchios-death-2013-7>.

⁶ Apart from the fact that an Italian Juvenile Court sentenced some of the boys to between 15-27 months of community service and placed them in a care program. See Corriere Della Sera, *Parla il papà della 14enne suicida per un video sul web: "Respiro ma non vivo più"* [A dad talks about the suicide of his 14 year old daughter following a video on the web: I breathe, but I am no longer alive], HUFFPOST (Aug. 1, 2016), http://www.huffingtonpost.it/2016/08/01/cyberbullismo-carolina-picchio-novara-_n_11292044.html.

to become more aggressive, unanticipated, and dangerous.⁷ Not only the behavior itself is evolving but also the platforms hosting these forms of behaviors-social networks themselves.⁸ Since their inception, traditional social networks sites such as MySpace and Facebook have attracted millions of users, many of whom have integrated these sites into their daily practices.⁹ However, the manifestations of social networks have since become wider, and traditional social networks have now given way to various and numerous platforms of communication. So much so that some even claim: “All media are social. Without question, media will foster some form of social connection.”¹⁰ In other words,

⁷ In May 2017, 21-year-old Phillip Budeikin pleaded guilty to at least 16 charges of inciting teenage girls to kill themselves using “Blue Whale,” a Russian-created social media game in which participants are given a 50-day challenge by an online, anonymous “master.” The game consists of a series of challenges that become increasingly dangerous —beginning with such relatively harmless tasks as watching horror films all night, proceeding to self-mutilation, and ending in a challenge to commit suicide. *Blue Whale Challenge Administrator Pleads Guilty to Inciting Suicide*, BBC NEWS BEAT (11 May 2017), <http://www.bbc.co.uk/newsbeat/article/39882664/blue-whale-challenge-administrator-pleads-guilty-to-inciting-suicide>. Approximately 130 Russian teenage suicides have been attributed to this game from the end of 2015 to the middle of 2016. משהק הרשת שגורם: הלווייתן הכחול [Blue Whale, Social Networking Game that Causes Suicide], MAKO, (01/03/17 07:00), <http://www.mako.co.il/hix-special/Article-76228ffc8458a51006.htm>. A senior official from the Russian investigative committee stated that “Philipp and his aides at first attracted children on to VK [social network] groups by using mega- scary videos... Their task was to attract as many children as possible, then figure out those who would be the most affected by psychological manipulation.” *Blue Whale Game’ Blamed in Suicide of Texas Teenager*, BBC NEWS, *supra* note 7.

Although this particular event involved an adult targeting minors, and our research focuses on children as both perpetrators and victims, it still exemplifies the escalation and the magnitude of offensive behavior as well as its dire consequences. Another extremely violent online game that involves children as perpetrators and victims is the “X Game.” Developed in the UK, the “game” begins when someone sends the letter X to another child, who then replies with the name of the victim. All players must then try and come up with as many insults as possible targeting the victim: i.e., attacking their weight, appearance, and personality. Toby Meyjes, *Mother’s warning over sinister ‘Letter X’ Snapchat Bullying Game*, METRO NEWS (Monday 6 Mar 2017 1:22pm), <http://metro.co.uk/2017/03/06/mothers-warning-over-sinister-letter-x-snapchat-bullying-game-6491101/>. Two cases of suicide by 14 year old teenagers from the UK have also been linked to this game. See Joshua Taylor, *Parents warned about sick new ‘Letter X’ Snapchat bullying craze encouraging children to post vile abuse*, MIRROR NEWS (18:53, 5 Mar 2017), <http://www.mirror.co.uk/news/uk-news/parents-warned-sick-new-letter-9971114>.

⁸ “Social networking sites were traditionally defined as web-based services that allowed individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system.” Danah M. Boyd & Nicole Ellison, *Social network sites: Definition, history, and scholarship*, 13 (1) J. COMPUT.-MEDIATED COMMUN. 210, 211 (2007).

⁹ *Id.*

¹⁰ A NETWORKED SELF: IDENTITY, COMMUNITY AND CULTURE ON SOCIAL NETWORK SITES 309 (Zizi Papacharissi ed., 2010). Indeed, digital platforms such as Musical.ly, which claims to be the world's largest creative platform, allow individuals to create (film and edit) videos and share them

social networks had evolved to be involved in almost every activity children engage in: creating videos, sharing pictures or gaming, creating endless social platforms and thus exponentially raising the probability that children will be exposed to offensive content, including cyberbullying incidents.

The arena of social media violence among children also contains other key players aside from the harming and harmed parties—such as the operators of various websites and online services, the children’s parents,¹¹ the children’s teachers, and the education system as a whole—who all exert a certain degree of control over a child’s education and over the extent of her or his exposure to the Internet.¹² However, the present article is concerned

with friends or worldwide and are defined (at least in Musical.ly’s case) as “a social network app for video creation, messaging, and live broadcasting.” *Musical.ly*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Musical.ly> (last accessed Jan. 29, 2018). Another large international image and video sharing platform that acts as a *de facto* social network is Instagram: “Instagram is a simple way to capture and share the world’s moments” APPLE, <https://itunes.apple.com/au/app/instagram/id389801252?mt=8> (last accessed Jan. 29, 2018). It is thus possible to currently find an endless number of creative platforms and software applications designed for creating, sharing, editing, and posting content, and for being part of a community that shares comments, communicates and functions as a social network. In addition to creative platforms that manifest as social networks, most digital games today provide both a single-player and a multiplayer option, which involves playing with or against others and allows children communicating through these platforms as in social networks. Minecraft, for example is a three-dimensional sandbox game that imbues the players with a great amount of freedom in choosing how to play the game. Anthony Gallegos, *Minecraft Review*, IGN (23 Nov 2011 5:05 PM PST), <http://uk.ign.com/articles/2011/11/24/minecraft-review>. Clash Royale is another example of a real-time multiplayer head-to-head battle game set in the *Clash* Universe. CLASH ROYALE, <https://clashroyale.com/> (last accessed Jan. 29, 2018).

¹¹ Several technological mechanisms meant for notifying parents of harmful social network messages presently exist. Such mechanisms provide daily email reports on the websites accessed by the child, provide filtering software that prevents online assaults from reaching children, block harmful chat messages etc. For more information, see Gil Neulander, *Biryonoot Ba’Reshet* [Cyberbullying], HORIM VE’YELADIM [PARENT AND CHILD MAGAZINE], 2017, at 351. For the role of suggested role of parents in handling and eliminating the cyberbullying phenomenon as offered by a German scholar, see Andreas Krause, *Cyber-Mobbing in Jugendkulturen* [Cyber-Mobbing in Youth Cultures] (2010-2011) (unpublished Thesis, Neubrandenburg University) (on file with http://digibib.hs-nb.de/file/dbhsnb_derivate_0000000985/Diplomarbeit-Krause-2011.pdf). For a writer who argues for the greater involvement of parents in supervising their children with respect to cyberbullying, see Jim Kouri, *Parents Must be More Involved to Address Cyberbullying*, CYBERBULLYING AT ISSUE: SOCIAL ISSUES 57 (2012).

¹² For the liability of teachers and schools with respect to cyberbullying, consider New Zealand as a case in point. The New Zealand government stresses the Ministry of Education’s role in handling the issue and has resolved that New Zealand schools would be required to maintain programs that would increase the safety of their students’ online environment, and to formulate a proper Acceptable Internet Use Policy that would be signed by the entire student body. See Bullying Prevention Advisory Group, *Bullying Prevention and Response: A Guide for Schools* (2015),

<http://www.education.govt.nz/assets/Documents/School/Bullying-prevention/MOEBullyingGuide2015Web.pdf>. In addition, and for the role of school educational

with defining the behavior itself, and with the various aspects involved in criminalizing the harming parties themselves without assuming that they are the sole parties that should bear criminal liability.¹³ The uniqueness of the digital medium, the uniqueness of the parties involved in the harmful behavior – both harming and harmed, given their age – and the uniqueness of the consequences and ramifications of harm that is perpetuated within the social networks require a significant degree of analysis and examination with respect to the need for a specialized approach to the criminalization of such harmful behavior. This article's aim is to suggest a new model of criminalization addressing cyberbullying amongst children and youth considering all the various complexities involved.

We wish to clarify that our model of cyberbullying criminalization pertains to children and youth up to the age of 18, due to both the particular significance of social networks in their lives – they are generally more influential, all-encompassing, and constitutive for minors than they are for adults,¹⁴ - as well as to the attitudes of the legal system in general, and criminal law in particular, which treat minors and adults differently.¹⁵ Moreover, some legislators have similarly defined cyberbullying as a

personnel in the eradication and treatment of the phenomenon of online violence as suggested in Austria, *see* Christina Sulzbacher, *Mobbing in der Schule – Die Rolle der Lehrpersonen* [*Mobbing in Schools – the Role of Teachers*] (2014) (Unpublished Thesis, Wien University) (on file with http://othes.univie.ac.at/34725/1/2014-11-04_0846538.pdf); For Germany, *see* Krause, *supra* note 11; For the U.S. State of Massachusetts, *see* An Act Relative to Bullying in Schools, 2010 MASS. ACTS Chapter 92.; *Cyberbullying and the States*, NCSL (July 9, 2010), <http://www.ncsl.org/research/civil-and-criminal-justice/cyberbullying-and-the-states.aspx>; Mass. Dep't of Elementary and Secondary Educ., *Model Bullying Prevention and Intervention Plan*, (June 2014), <http://www.mass.gov/ago/public-safety/bullying-and-cyberbullying/information-and-resources/bullying-prevention-and-intervention-model-plan.html>; For Britain, *see* Education and Inspections Act 2006, c. 40 §89 (Eng.); For the State of Florida in the United States, *see* FLA. STAT. §10006.147 (2018). For similar legislation in the State of Illinois in the United States, *see* ILL. COMP. STAT. HB4201/5 (2013-2014). For guidelines published by French Minister of National Education Luc Chatel that increased French educators' commitment to act toward the phenomenon's elimination, *see* Guide pratique pour lutter contre le cyber-harcèlement entre élèves, (2011), http://media.education.gouv.fr/file/09_septembre/58/6/guide-cyberharcèlement_190586.pdf. For protective measures that may be applied to students within the school environment, *see* Holger Steenhoff, *Das Internet und die Schulordnung* [*The Internet and School Regulations*], 32 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NEW J. OF ADMIN. L.] 1190 (2013).

¹³ It might be possible to file criminal charges against parents, teachers or other professionals who have been informed of severe acts of cyberbullying (by way of mandatory reporting legislation). However, and as noted above, the present article is concerned with the possible criminal liability of the online “bully” her or himself.

¹⁴ Some writers have argued that children's use of social networks constitutes an addiction. A study conducted by the National Center for Suicide Research and Prevention at Sweden's Karolinska Institute that examined data collected from 11,956 adolescents in 178 schools found that Israeli children top the list of adolescents suffering from Internet addiction.

¹⁵Section 34(f) of the Israeli Penal Law, states that the age of criminal responsibility in Israel is 12. Penal Law, 5737–1977, §34(f) BL 226 (Isr.). Section 19 of the German Criminal Code states that the age of criminal responsibility in Germany is 14. Strafgesetzbuch [StGB] [Criminal Code],

phenomenon characteristic of the behavior of children and youth.¹⁶ This article will propose a model that will allow the victims and other relevant parties (parents, teachers and enforcement authorities) to characterize and distinguish severe offensive online behaviors that merit legal attention as opposed to childish online behaviors that should be treated outside of the legal framework. In addition, the proposed model will also address the unique characteristics of social networks – in terms of both communication and technology - as they manifest in the lives of children, since these shape and occasionally even define this very same communication as well as its severe repercussions.

We shall thus employ the present article in the service of defining the phenomenon of “online violence among children and youth,” and centering a new model which is based on the formulation of three “aggravating categories” that will help in classifying those violent online behaviors that constitute acts that merit and justify criminalization. These are the degree of sexuality, the degree of intensity, and the degree of violence associated with the harmful communication, with a mere one of the three sufficing for the application of the criminal offense. The objective of these aggravating categories is to allow us, and all those involved in the chain of criminalization (enforcement agencies included) to distinguish between morally tainted behaviors that should not be criminalized, and which need to be treated extra-criminally and occasionally extra-judicially by the key players that surround children (such as the education system and the children’s parents), and anti-social behaviors that inflict severe harms on social values and thus necessitate some form of legal response.

§19 (Ger.). According to the Law of England and Wales the age of criminal responsibility is 10. *Age of criminal responsibility*, GOV.UK <https://www.gov.uk/age-of-criminal-responsibility> (last visited April 15, 2019). In the U.S. according to a report by the Center on Juvenile and Criminal Justice Thirty-five states in the US don’t have a minimum age of criminal responsibility, while the rest range from 6 to 10 years of age. *The minimum age of criminal responsibility continues to divide opinion*, THE ECONOMIST (Mar 15th 2017), <https://www.economist.com/graphic-detail/2017/03/15/the-minimum-age-of-criminal-responsibility-continues-to-divide-opinion>. We believe that cyberbullying is a phenomenon more characteristic of children than of adults; while the phenomenon of online violence among children is referred to as cyberbullying, online violence among adults is referred to as cyber harassment. See the following definition of the term cyberbullying, for example, that delimits it as a behavior associated with children. Larissa Hirsch, *Cyberbullying*, KIDSHEALTH (June 2014), http://kidshealth.org/en/parents/cyberbullying.html#kha_11. In addition, the overwhelming majority of the academic treatments and studies of cyberbullying focuses on children up to the age of 17. See Vimala Balakrishnan, *Cyberbullying among young adults in Malaysia: The roles of gender, age, and Internet frequency*, 46 COMPUT. IN HUM. BEHAV., 149, 150 (2015). Finally, the phenomenon mostly appears among children between the ages of 13-15. See Robert S. Tokunaga, *Following you home from school: A critical review and synthesis of research on cyberbullying victimization*, 26 COMPUT. IN HUM. BEHAV. 277 (2010). Given the above, we have decided to focus on the phenomenon’s definition and to delimit the behavior to children.

¹⁶Some states (Idaho, Louisiana, Nevada, Washington, and Kentucky in the United States, and New South Wales in Australia) define the problem of cyberbullying as primarily associated with children and have accordingly instituted pertinent legislation that focuses on cyberbullying perpetrated against minors.

This article provides the data necessary for molding an appropriate public policy that would address aggressive behavior among children in the digital domain as it provides relevant background information on the phenomenon, maps the available existing legal models, and suggests the reframing of these tools with a view to mitigate cyberbullying. The first part of the article focuses on the background of the phenomenon of cyberbullying among children, including a discussion on children and the Internet and how technology, specifically social networks enhances and shapes the behavior of online aggression. The second part discusses legal practices involved in coping with online violence, namely addressing two models: the dedicated offense model, that institutes a new ‘online violence’ offense and a second model that applies existing physical-world offenses to the online domain. This part also includes a discussion of the criticism associated with the use of each model. The third part discusses the uniqueness of the population involved in the phenomenon and provides a background for further relevant policy discussions. The fourth part offers a new “aggravating categories” model for handling the phenomenon of online violence among children and youth within the framework of criminal law, and which would classify certain behaviors as residing within aggravating categories that merit criminalization as opposed to other behaviors that would not fall within the scope of this suggested definition and that would be classified as harmful behaviors that should be eradicated by extra-criminal means. Finally, possible criticism for the “aggravating categories model will be discussed followed by a conclusion.

A. Online Violence among Children

1. Defining Cyberbullying

While attempts to define cyberbullying have been made by international organizations, EU institutions, and scholars, we have yet to witness a single and internationally accepted definition of cyberbullying.¹⁷ The literature on electronic bullying behavior among children and youths employs various terms to describe it. These include cyberbullying,¹⁸ electronic bullying,¹⁹ electronic aggression,²⁰ and adolescent dating violence and abuse.²¹ More recently, scholars associating cyberbullying with other

¹⁷ Virginia Dalla Pozza et al., *Cyberbullying Among Young People: Study for the Libe Committee 8* (2016), [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571367/IPOL_STU\(2016\)571367_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571367/IPOL_STU(2016)571367_EN.pdf).

¹⁸ ROBIN KOWALSKI ET AL., *CYBERBULLYING: BULLYING IN THE DIGITAL AGE* 56 (2nd ed. 2012).

¹⁹ Robin Kowalski & Susan P. Limber, *Electronic Bullying among Middle School Students*, 41 (6) J. ADOLESCENT HEALTH 22, 22 (2007).

²⁰ Jacek Pyżalski, *From Cyberbullying to Electronic Aggression: Typology of the Phenomenon*, 17(3) EMOTIONAL AND BEHAV. DIFFICULTIES 305, 305 (2012).

²¹ Karlie Stonard et al., “*They’ll Always Find a Way to Get to You: Technology Use in Adolescent Romantic Relationships and Its Role in Dating Violence and Abuse.*” 32(14) J. OF INTERPERSONAL VIOLENCE 2083, 2084 (2017).

nefarious online behaviors have begun to use the general term "electronic aggression"²² or "cyber aggression."²³

The U.S. Centers for Disease Control and Prevention have adopted this trend and now use the term "electronic aggression" for describing internet harassment and cyberbullying and as a catch-all term that best describes all types of electronic violence.²⁴ The U.S. Department of Health and Human Services defines cyberbullying as "bullying that takes place using electronic technology,"²⁵ and defines bullying as "unwanted, aggressive behavior among school aged children that involves a real or perceived power imbalance" that "is repeated, or has the potential to be repeated, over time."²⁶ Alternative definitions of cyberbullying do not require a power imbalance but still require the presence of a minor on both sides of the communication (i.e., the perpetrator and the victim).²⁷ We adopt this requirement and define cyberbullying for the purposes of the present article as a behavior that involves children as both aggressors as well as victims.²⁸

Europe, in turn, has been inching closer to attaining a consensus on the definition of cyberbullying over the course of the last half-decade,²⁹ and most European countries agree that it involves the deliberate and repeated misuse of a communication technology by an individual or group such as to threaten or harm others.³⁰ This conceptual definition

²² Marci Feldman Hertz & Corinne David-Ferndon, *Electronic Media and Youth Violence: a CDC Issue Brief for Educators and Caregivers* 3 (2008), https://www.cdc.gov/violenceprevention/pdf/electronic_aggression_researcher_brief-a.pdf.

²³ It is important to note that some academics have recently argued that cyberbullying may not be the most appropriate term with which to describe abusive behaviors conveyed through digital communication, and the wider notion of 'cyber-aggression' has been introduced in order to indicate a broader group of abuses that may occur on the net. See Pozza et al., *supra* note 17.

²⁴ Feldman & Ferndon, *supra* note 22.

²⁵ *What Is Cyberbullying*. STOP BULLYING, <https://www.stopbullying.gov/cyberbullying/what-is-it/index.html>, (last visited Jan. 15, 2018).

²⁶ *What is Bullying?* STOP BULLYING, <https://www.stopbullying.gov/what-is-bullying/index.html>, (last accessed Jan. 15, 2018).

²⁷ *Id.*

²⁸ For the purpose of the present article we have adopted the United Nations Convention on the Rights of the Child's definition of a 'child' as a person below the age of 18 unless the laws of a particular country set the legal age for adulthood at a younger age. See Convention on the Rights of the Child, art.1, G.A. Res. 44/25 (Nov. 20, 1989) (hereinafter CRC).

²⁹ Although the need for a clearer and broader definition of cyberbullying has been recognized throughout Europe, only fourteen EU Member States have provided an official definition of this phenomenon (including any definition provided in legal/policy documents as well as definitions employed by public authorities). These fourteen states are Austria, Bulgaria, Cyprus, the Czech Republic, Finland, France, Germany, Hungary, Ireland, Italy, Luxembourg, Malta, the Netherlands, and Spain. The specific definitions vary from country to country. For full discussion, see *Cyberbullying Among Young People*, *supra* note 17.

³⁰ Popović-Čitić, Branislava, Sladjana Djurić, & Vladimir Cvetković, *The prevalence of cyberbullying among adolescents: A case study of middle schools in Serbia*, 32(4) SCH. PSYCHOL. INT'L 412 (2011). See also Anthony J. Roberto, & Jen Eden, *Cyberbullying: Aggressive communication in the digital age*, ARGUMENTS, AGGRESSION, AND CONFLICT: NEW DIRECTIONS

of cyberbullying is thus made up of multiple components. Firstly, cyberbullying involves the use of communication technologies, which include instant messaging, e-mail, text messaging, and cellular phones. Secondly, cyberbullies use these technologies to threaten or cause harm to others. These messages can include threats of physical or psychological violence, intentional embarrassment, exclusion, spreading of rumors, or statements that incite problems in others' relationships. Thirdly, cyberbullying is intentional, mindful, and deliberate; the exchange of aggressive messages meant as play or teasing lies outside the cyberbullying phenomenon. Fourthly, most cyberbullying experiences involve repeated behavior, although it is possible for a single, extreme case to qualify as cyberbullying. Fifthly and finally, an individual or group of people can cyberbully another.³¹ For simplicity's sake, the present article will employ the U.S. Human Health and Service's definition of cyberbullying—"bullying that takes place using electronic technology."

The difficulty in attaining a single definition to cyberbullying effect measuring its extent. Whether the incidence of cyberbullying is on the rise³² or whether it has leveled out, is debated by scholars.³³ Studies on cyberbullying victimization/perpetration present highly variable results, related in large part to the vast and distinct definitions of cyberbullying as shall be further discussed.³⁴ Furthermore, and as a result of the absence of a commonly agreed definition of cyberbullying, the measurement of the phenomenon differs from country to country and from study to study,³⁵ and prevalence estimates for the cyberbullying victimization of children range between approximately 10 and 40%.³⁶ These numbers are similar worldwide.³⁷ Either way, cyberbullying as a phenomenon is pervasive

IN THEORY AND RESEARCH 198-216 (Theodore Avtgis, & Andrew S. Rancer eds., 2010). Further, see Ann Wade & Tanya Beran, *Cyberbullying: The new era of bullying* 26 CAN. J. OF SCH. PSYCHOL. 44- 61 (2011).

³¹ Matthew W. Savage & Robert S. Tokunaga, *Moving toward a Theory: Testing an Integrated Model of Cyberbullying Perpetration, Aggression, Social Skills, and Internet Self-Efficacy*, 71 COMPUT. IN HUM. BEHAV. 353 (2017).

³² The increased availability of new technologies has resulted in a rise in cyberbullying cases in recent years. See Pozza et al., *supra* note 17. See also Robert Slonje & Peter K. Smith, *Cyberbullying: Another main type of bullying?* 49 SCANDINAVIAN J. OF PSYCHOL. 147 (2008). (Their research suggested that the prevalence of cyberbullying increases as the types of technology involved in its commission change).

³³ Dan Olweus, *Cyberbullying: An Overrated Phenomenon?* 9 EUR. J. DEV. PSYCHOL. 520 (2012). (Olweus argues that the incidence of cyberbullying has not increased over the last few years.)

³⁴ For a more detailed discussion of this issue, see Dan Olweus, *School Bullying: Development and Some Important Challenges*, 9 ANN. REV. CLINICAL PSYCHOL. 751 (2013). Olweus suggests that differences in cyberbullying rates could be attributed to several factors: the ages and locations of the individuals sampled, the reporting time frame being assessed (e.g., lifetime, 2 months, 6 months), and the frequency in which a person is classified as either perpetrator or victim (e.g., at least once, several times a week).

³⁵ Pozza et al., *supra* note 17.

³⁶ See Robin Kowalski et al., *Bullying in the Digital Age: A Critical Review and Meta-analysis of Cyberbullying Research Among Youth*, 140(4) PSYCHOL. BULL. 1073-1137 (2014).

³⁷ A worldwide survey conducted in 24 countries (Argentina, Australia, Belgium, Brazil, Canada, China, France, Germany, Great Britain, Hungary, India, Indonesia, Italy, Japan, Mexico, Poland,

and requires policy framers' attention as it becomes even more challenging and violent in nature due to new and evolving technologies as described above.³⁸

2. Children and the Internet

It is important to note that the present article does not argue that we are concerned with an incurable “new epidemic,”³⁹ nor does it seek to raise a “moral panic,”⁴⁰ but rather seeks to discuss an actual phenomenon – the harmful conduct of children and youth on social networks, which gives rise to harm experienced by a large percentage of children.⁴¹ Indeed, the phenomenon does not appear to be transitory in a world where children have adopted the Internet as an inseparable part of their lives.⁴² Some have even claimed that the phenomenon has been expanding given the increasing accessibility of cellphones and computers; we can thus assume that children are being exposed to cyberbullying at an earlier age and to a greater extent.⁴³

Russia, Saudi Arabia, South Africa, South Korea, Spain, Sweden, Turkey, the United States of America) in 2011 found that 66% of the 18, 687 interviewees, both children and adults, had seen, read or heard something about cyberbullying behaviors. See Pozza et al., *supra* note 17.

³⁸ See Blue Whale game and X game described *supra* note 7.

³⁹ Professor Amos Rolider, on the other hand, refers to the phenomenon of online violence as a ‘new epidemic. See Nurit Kahana, *כיגוס ראשון מסוגו בנושא פגיעות מקוונות* [First conference of its kind on the subject of online vulnerability], NEWS1, <http://www.news1.co.il/Archive/0020-D-228951-00.html>.

⁴⁰ A term first coined in 1830, but widely publicized when British sociologist Stanley Cohen used it in a study he conducted on the effect of the media on children in 1972. See STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS* (3rd. ed., 1972).

⁴¹ See TALI HEIMAN ET AL., *ALIMUT U’PEGIOT BE’RESHET HA’INTERNET: ME’AFYENIM, DEFUSIM, GORMEY SIKUN VE’GORMIM MEGINIM BE’KEREV YELADIM U’BENEY NO’AR* [VIOLENCE AND HARM ON THE INTERNET: CHARACTERISTICS, PATTERNS, RISK FACTORS AND PROTECTIVE FACTORS AMONG CHILDREN AND YOUNG ADULTS] (2014), <http://ecat.education.gov.il/Attachment/DownloadFile?downloadId=7735>. The study involved the participation of 1,094 elementary, junior high, and high school students, and found that 27% of the students were harmed by online violence.

⁴² Ninety five percent of American children access the Internet, and seventy four percent of them do so through a cellular device. See Sameer Hinduja & Justin W. Patchin, *Cyberbullying: Identification, Prevention and Response* (October 2014), <http://cyberbullying.org/Cyberbullying-Identification-Prevention-Response.pdf>. For similar findings in Germany, see Lukas Schönmmüller, *Vom Schulhof ins Internet – Eine Analyse des Phänomens Cybermobbing und wie ein Computerspiel davor schützen könnte* [From the Schoolyard to the Internet: An Analysis of the Phenomenon of Cybermobbing and the Manner in which a Computer Game Can Protect us from it Before the Fact] 39 (2014) (unpublished Thesis, Mittweida University) (onfile with https://monami.hs-mittweida.de/files/4760/BA_FINAL_Lukas_Schoenmueller.pdf).

⁴³ See, for example, the number of reports made to a children’s hotline in England in the course of 2013, which represent an 87% increase compared to the previous year. See ChildLine annual review, *ChildLine Review 2012/13*, NSPCC, <http://www.nspcc.org.uk/globalassets/documents/research-reports/childline-review-2012-2013.pdf> (last updated 07 Dec 2018).

The Internet can be described as hiding in the personal computer like a magic box which opens at a touch, like a fairy's wand that brings the world into the home and by others as both a cultural and a social revolution, has clearly changed our lives, and has transformed children from content consumers to content creators, as well as opened a window to a new world. However, this new world also includes new and unique behaviors, which may occasionally be harmful.

Digital media undoubtedly forms an integral part of children's and adolescents' lives,⁴⁴ and has pervaded and globally altered their lives⁴⁵ as well as the ways in which they socialize, change and redefine social networks,⁴⁶ seek information, and entertain themselves.⁴⁷ Indeed, and in the course of the past two decades, scholars have identified the emergence of a distinct and recognizable global population of young people referred to as "digital natives" that were born into the digital age and grew up using information technologies in their daily lives.⁴⁸ With more than 90% of adolescents using mobile phones, smartphones, laptops, and tablets for daily communication,⁴⁹ children stand at the forefront of technologies as information and communication technologies adoption, with 70% of children aged 9–17 reporting that they are active internet users.⁵⁰

It can possibly be contended that children's extensive use of technology has yet to reach its peak. Data on younger children in the U.S. reveals that more than 50% of

⁴⁴ The past decade has witnessed a substantial increase in internet usage by children under nine years old. See Donell Holloway et al., *Zero to Eight. Young Children and Their Internet Use* (Aug. 2013), https://childhub.org/en/system/tdf/library/attachments/1665_Zero_to_eight_original.pdf?file=1&type=node&id=6256.

⁴⁵ International Telecommunication Union, *Measuring the Information Society* (2013). https://www.itu.int/en/ITU-D/Statistics/Documents/publications/mis2013/MIS2013_without_Annex_4.pdf.

⁴⁶ Adolescents are currently the quintessential users of the internet since they spend more time online than adults. They also use the internet for social interaction more often than adults do. See Patti M. Valkenburg & Jochen Peter, *Social Consequences of the Internet for Adolescents: A Decade of Research*, 18(1) CURRENT DIRECTIONS IN PSYCHOL. SCI. 1 (2009).

⁴⁷ Tom Boonaert & Nicole Vettenburg, *Young People's Internet Use: Divided or Diversified?* 18(1) CHILDHOOD 54–66 (2011). Also see DANAH BOYD, *IT'S COMPLICATED: THE SOCIAL LIVES OF NETWORKED TEENS* (2014). Also see H. Jenkins, M. Ito, & d. boyd, *PARTICIPATORY CULTURE IN A NETWORKED ERA* (2015). Further, see Sofia Lundmark & Ann-Carita Evaldsson, *Click-guides and panic buttons: Designed possibilities for youth agency and user empowerment in online youth counselling services*, 24(2) CHILDHOOD 260 (2017).

⁴⁸ *Measuring the Information Society*, *supra* note 45.

⁴⁹ Amanda Lenhart, *Teens, Social Media & Technology Overview 2015*, PEW RESEARCH CENTER (April 9, 2015), <http://www.pewinternet.org/2015/04/09/teens-social-media-technology-2015/>.

⁵⁰ Joanne Phyfer et al., *Global Kids Online South Africa: Barriers, Opportunities and Risks. A glimpse into South African children's internet use and online activities*, LSE RESEARCH ONLINE TECHNICAL REPORT (2016), http://eprints.lse.ac.uk/71267/2/GKO_Country-Report_South-Africa_CJCP_upload.pdf.

them receive their first cellphone before the age of 7.⁵¹ In Israel, 81% of children begin using a cellphone before their twelfth birthday,⁵² and 83% of respondents aged 8-15 own a smartphone.⁵³ Data concerning Israeli Internet use habits reveals that 91% of children aged 12-17 use the Internet every day, and that the average age of first use is 7.⁵⁴

Over and above the difficulty inherent in defining cyberbullying as a behavior, it is also important to understand that the digital age has also presented us with a new kind of social peril: it allows children to not only be the consumers of offensive content but also allows them to become offensive content creators, manufacturers, and distributors by permitting the generation and publication of offensive, violent, sexual, and at times, even pornographic content.⁵⁵ In other words, it has allowed them to create a market in which they are the objects as well as the consumers of this offensive content.⁵⁶

Regarding what children do while online scholars have recently identified a change in the, and have observed a move from the use of digital media for content consumption to the use of media as a means of communication.⁵⁷ As noted above, children and youth primarily employ the Internet to social ends, and most of their time online is devoted to inter-personal communication, which is usually meant for the preservation of existing social ties.⁵⁸ As a result, the online era has transformed children and youth from knowledge consumers to content creators. The exact nature of “content creation” is complex and involves the creation of an avatar (a figure representing the self), the publication of a blog,

⁵¹ Herb Scibner, *Most American Children Have a Cellphone Before They Turn 7 Years Old*, NATIONAL DESERT NEWS

(April 7, 2015 5:45 pm), <http://www.deseretnews.com/article/865625962/Most-American-children-have-a-cell-phone-before-they-turn-7-years-old.html>.

⁵² Rafi Mann & Azi Lev-On, Duach Shenati: Ha'Tikshoret Be'Yisra'el 2014: Sidrey Yom, Shimushim U'Megamot [Annual Report: Communication in Israel 2014: Agendas, Uses, and Trends] 81 (2014), <http://aunmedia.org/sites/default/files/research/MediaReport2014.pdf>.

⁵³ Sarid Institute, *Tots'ot Seker Shimush Be'Telefon Chacham Be'Kerev Yeladim* [Results of a Survey of Smartphone Use Among Children], (2015), https://www.isoc.org.il/wp-content/uploads/2015/02/sarid_institute_january_2015_kid_cellphone_survey.pdf.

⁵⁴ Israel Internet Association, *Tefisot Ve'Amadot Yeladim Ve'No'Ar Kelapei Sakanot Ba'Reshet* [Perceptions and Attitudes of Children and Young Adults on and toward Online Dangers] (2012), https://www.isoc.org.il/wp-content/uploads/2013/01/tpysvt_vmdvt_klpy_htnhgvvt_sykvn_brsht_hytrnt_bqrb_yldym_vmtbgrym_1.pdf.

⁵⁵ Given the increasingly more widespread proliferation of mobile phones and free software which facilitates correspondence and content creation, it is hardly surprising that one study of children aged 13-17 revealed that 91% of its respondents admit to writing texts and creating online content. See Lenhart, *supra* note 49.

⁵⁶ Andreas Kaplan & Michael Haenlein, *Users of the World, Unite! The Challenges and Opportunities of Social Media*, 53 BUS. HORIZ. 59 (2010).

⁵⁷ See AMANDA THIRD, ET AL. CHILDREN'S RIGHTS IN THE DIGITAL AGE: A DOWNLOAD FROM CHILDREN AROUND THE WORLD, 38 (2014).

⁵⁸ Meyran Boniel-Nissim & Michal Dolev-Cohen, Yeladim Kotvim... 'Al Kiro: Tarbut Ha'Facebook [Children writing... on walls: Facebook Culture], 'Iyun U'Mechkar Be'Hachsharat Morim [Teacher Training Studies and Research] 207-209 (2012).

the distribution of content via content distribution software, etc.⁵⁹ For the purposes of the present discussion, however, it should be seen as forming part of any communication whether it involves sending a message to one person, writing a group message, distributing an image, etc. Children and youth are thus currently capable of creating content that other people may be exposed to.

Data of 2015 from the U.S. reveals that 76% of children aged 12-17 access social networks.⁶⁰ In Israel, more than 90% of 12-14-year-olds access social networks.⁶¹ According to another survey carried in Israel children spend an average of 3.8 hours a day on social networks.⁶² Another survey states that about a quarter of Israeli children use their cellphone for more than 5 hours a day.⁶³ Either way, this represents a significant time when the Internet in general, and social networks in particular, have become a platform that constitutes a ‘living environment’ and an inseparable part of children’s lives. Furthermore, it should not be assumed that the number of social network users is set to decrease, given that we are concerned with networks who are undergoing constant growth in terms of both the number of users, the number of activities that may be engaged in within them, and the media with which they may be accessed.⁶⁴ The characteristic phenomena of online behavior should thus not be considered transitory – quite the contrary. Indeed, as any given technology advances, its significance and ways of use expand, and it increasingly becomes an inseparable part of our and our children’s lives.⁶⁵

⁵⁹ Sonia Livingstone et al., *Risks and Safety for Children on the Internet: The UK Report*, EU KIDS ONLINE 19 (2010):

[http://www.lse.ac.uk/media@lse/research/EUKidsOnline/EU%20Kids%20II%20\(2009-11\)/National%20reports/UKReport.pdf](http://www.lse.ac.uk/media@lse/research/EUKidsOnline/EU%20Kids%20II%20(2009-11)/National%20reports/UKReport.pdf).

⁶⁰ Lenhart, *supra* note 49.

⁶¹ Maria Rabinovich, Sugiyot Merkaziyot Be’Avodat Ha’Ve’Ada Le’Zechuyot Ha’Yeled [Central Issues Addressed in the Work of the Committee on the Rights of the Child], THE KNESSET, RESEARCH AND INFORMATION CENTER 27 (2013).

⁶² Eti Weissblai, Yeladim Be’Reshatot Chevratyot Ba’Internet [Children on the Internet’s Social Networks], THE KNESSET, RESEARCH AND INFORMATION CENTER (2011), <https://www.knesset.gov.il/mmm/data/pdf/m02856.pdf>. Page 5 of this report cites a survey carried out by the Teenk Marketing Company and entitled “Young Adults: Media, Lifestyles, and Consumption – Quantitative Survey Findings, January-May 2010” [Beney No’ar: Mediya, Signon Chayim Ve’Tsrachanut – Mimsaey Seker Kamutiym, Yanuar-May 2010] that itself appeared in Israel National Council for the Child, *Children in Israel 2010 – A Statistical Yearbook* [Yeladim Be’Yisrael 2010 – Shenaton Statisti].

⁶³ See Sarid Institute, *supra* note 53.

⁶⁴ See A NETWORKED SELF: IDENTITY, COMMUNITY AND CULTURE ON SOCIAL NETWORK SITES, *supra* note 10.

⁶⁵ The Israeli Ministry of Education is moving toward the digitization of the curriculum by way of a learning program based on the BYOD (Bring Your Own Device) philosophy, and by way of transforming schools into digital organizations that place an emphasis on the development of digital literacy. See the official Ministry of Education website at <http://sites.education.gov.il/cloud/home/tikshuv/Pages/tikshuv.aspx>; in implementing the plan, participating schools intend to ask their students to come to school with end-user devices – tablets or smartphones – and to make use of them during classes. See שאלות נפוצות בנושא “שימוש דגם מתקדם

3. Focusing on Cyberbullying as a Behavior

Besides the benefits associated with content creation, such as the freedom of expression, the encouragement of participation in democratic discourse, etc., the content created by children and youth may also be harmful. A study carried out in England found that 19% of 11-16-year-olds were exposed to harmful content created by social network “friends,” with this percentage increasing to 32% among 14-16-year-old girls.⁶⁶ Children and youth are thus harmed by content that was created by other children rather than by content created by an unknown adult.⁶⁷

A harmful message may appear in many forms, and children often use of the technological means at their disposal in order to create different types of harmful content, such as harmful rumors, threats, taunts, harassments and intimidations.⁶⁸ Some harmful messages focus on sexual aspects; a 2010 survey conducted by the University of Utah among more than 600 participants aged 14-16, for example, found that 20% of the respondents had sent sexual pictures of themselves to other people as text messages, 40% admitted to having received sexual messages, and, among those, 25% stated that they forwarded these messages to another person⁶⁹. A 2015 survey conducted in Israel and involving 739 participants found that about half of them received a nude photo on at least one occasion, about half took nude photos of themselves, and, among these, 40% sent the nude video or photo to another person.⁷⁰ Either way, engaging in the practice of taking and

BYOD בבית הספר [Frequently asked questions about implementing an advanced BYOD model to school], STATE OF ISRAEL MINISTRY OF EDUCATION, http://sites.education.gov.il/cloud/home/tikshuv/Pages/isum_degem.aspx (last accessed April 15, 2019).

⁶⁶ Livingstone et al., *supra* note 59. For similar findings in Germany, see Kai Cornelius, Plädoyer für einen Cybermobbing-Straftatbestand [A Plea for a Cybermobbing Offense], 47 ZRP: J. OF LEGAL POL’Y 164 (2014); for similar findings in Australia, see Amy Dwyer & Patricia Easteal, *Cyberbullying in Australian Schools: the Question of Negligence and Liability*, 38 ALTERNATIVE L.J. 92 (2013).

⁶⁷ Jessica Ringrose et al., *A Qualitative Study of Children, Young People, and “Sexting:” A Report Prepared for the NSPCC LSE RESEARCH ONLINE* 8 (2012).

⁶⁸ See Michelle Wright, *Cyber Victimization and Perceived Stress: Linkages to Late Adolescents’ Cyber Aggression and Psychological Functioning*, 47(6) YOUTH AND SOCIETY 790-792 (2015).

⁶⁹ See Donald S. Strassberg et al., *Sexting by High School Students: An Exploratory and Descriptive Study*, 42(1) ARCH. SEX. BEHAV. 15 (2013). A study conducted in Britain revealed much higher percentages: 40% of its participants reported being acquainted with a distributor of nude photos, and 27% claimed it was a regular and normal phenomenon which could be perceived as a commonplace occurrence. See Andy Phippen, *Sharing Personal Images and Videos Among Young People*, SOUTH-WEST GRID FOR LEARNING (2009), http://www.swgfl.org.uk/products-services/esafety/resources/E-Safety-Research/Content/Sexting-Survey-2_

⁷⁰ See Dr. Efrat Habaron & Shlomit Habaron, Mah U’Matay Be’Chinuch Mini: ‘Ekronot Manchim Li’Vniyyat Tochnot Chinuch Mini Shel Beney No’ar Be’Yisra’el [The What and the When of Sexual Education: Guiding Principles for the Formulation of Sexual Education Programs for Israeli Young Adults], HEBREW PSYCHOLOGY (30/72017), <https://www.hebpsy.net/articles.asp?id=3570>.

exchanging nude photos among children and youth can quickly become harmful, and some argue that the very exposure to and engagement with nudity at a young age is harmful in and of itself,⁷¹ regardless of the degree of prior consent expressed in the creation of such content.⁷² Other forms of harmful content creation include offensive rumors, threats, taunts, harassments and intimidations.⁷³

While adults may not realize the gravity of the effects of cyberbullying,⁷⁴ they are nonetheless real and dangerous. Cyberbullying can cause psychological, emotional, and physical stress, and it can also lead to depression, isolation, and suicide, especially during adolescence, a time when a child's peer group becomes especially important.⁷⁵ In this respect, a 2014 poll among 2,000 adults and children across Europe showed that 55% of children became depressed, 35% considered harming themselves, and 38% considered suicide as a result of cyberbullying.⁷⁶

Moreover, an alarming 2018 study found that depressive symptoms, suicide-related outcomes, and suicide deaths among adolescents all rose since 2010.⁷⁷ Between 2009/2010 and 2015, 33% more adolescents exhibited high levels of depressive symptoms, 12% more reported at least one suicide-related outcome, and 31% more died by suicide.⁷⁸ This increase in depressive symptoms and higher suicide rates is linked to social media and electronic devices' use and a positive correlation was established between time spent on

In this respect, a 16-year-old boy from southern Israel related that "there are nude photos of girls available at any school in the city, in any year group. It's like playing cards – kids exchange them. I'll send you some and you'll send me some." Indeed, such photos are sometimes sent in return for a 5 NIS fee. *See* Arnon Ben-Dror, 'Erim? Tit'oreru! [Awake? Wake Up!], *YouMagazine* July 2014, at 60.

⁷¹ Yuval Karniel and Haim Wismonski, *Chofesh Ha'Bituy, Pornografia Ve'Kehila Ba'Internet* [*The Freedom of Expression, Pornography, and Community on the Internet*], *MECHKAREY MISHPAT* [STUDIES IN LAW] 259, 301 (2007).

⁷² It is also possible to argue that no true consent exists among children and young adults who are pressurized to send pictures of and reveal details about themselves in order to remain relevant to and up-to-date with respect to their peer group.

⁷³ *See* Wright, *supra* note 68.

⁷⁴ A survey conducted on 2,000 European adults and children revealed that 34% of adults consider bullying a 'normal part of growing up,' and 16% of adults as a 'character building' experience. *See* Pozza et al., *supra* note 17.

⁷⁵ Ehab Zahriyeh, 'Make This All Go Away': *Cyberbullying Multiplies Teen Pain*, *ALJAZEERA AM*. (Sept. 17, 2014, 6:00 AM), <http://america.aljazeera.com/watch/shows/edge-of-eighteen/articles/2014/9/17/-make-this-all-goawaycyberbullyingmultipliesteenpain.html>.

⁷⁶ *Should cyberbullying be a criminal offence in the EU?*, *DEBATING EUROPE* (19/03/2015), <http://www.debatingeurope.eu/2015/03/19/should-cyberbullying-be-a-criminal-offence-in-the-eu/>.

⁷⁷ Jean Twenge et al., *Increases in Depressive Symptoms, Suicide-Related Outcomes, and Suicide Rates Among U.S. Adolescents After 2010 and Links to Increased New Media Screen Time*, 6(1) *CLINICAL PSYCHOLOGICAL SCIENCE* 3, 8. (2018).

⁷⁸ *Id.* The increase in depressive symptoms and suicide related outcomes was driven almost exclusively by females; between 2009/2010 and 2015, 58% more females scored high in depressive symptoms and 14% more reported at least one suicide-related outcome.

social media and electronic devices and depressive symptoms and suicide-related outcomes.⁷⁹ Even though this research linked its findings to social media and electronic devices' use it will be wrong not to consider that the content of the communication itself is a crucial factor.

Despite the wide range of harms – from “childish” taunts⁸⁰ to distribution of sexual images and even the encouragement of suicide⁸¹ – it is wrong for the law to remain silent on the issue given the unique characteristics of this kind of violence, which include the ages of the parties involved – both the harming parties, the bystanders, and the victims, as well the extent of the violent harm inflicted both in terms of its widespread and continuous exposure as well as its visual aspects.⁸²

⁷⁹*Id.* at 13. Children and adolescents who spent more than 5 hr per day on electronic devices were 66% more likely to have at least one suicide-related outcome than those who spent 1 hr per day. In addition, 8th and 10th graders who spent more than 40 hr per week on social media were nearly twice as likely to be unhappy as those who spent 1 to 2 hr per week (24% vs. 13%). One form of offensive communication children engage in and encounter while using social networks is cyberbullying; 17% of the calls received by European helplines in 2015 are related to cyberbullying, with sexuality and online relationships coming second and being the focus of over 11% of calls. See THUY DINH ET AL., *INSAFE HELPLINES: OPERATIONS, EFFECTIVENESS AND EMERGING ISSUES FOR INTERNET SAFETY HELPLINES* (2016). Moreover, youth-produced sexual imagery, abuses of privacy, and “sexting” have likewise been identified as a growing concern across Europe and beyond. See Monica Bulger et al., *Where policy and practice collide: Comparing United States, South African and European Union approaches to protecting children online* 19(5) *NEW MEDIA & SOCIETY* 750, 753 (2017).

⁸⁰ There may be some cases where mere taunts have serious ramifications. A 2015 study revealed that 47% of children in the 4th-9th grades had experienced online taunts. 29% were ostracized from an online group, 10% were the object of an online hate group, 22% suffered from the distribution of harmful messages, 37% were the victims of derision, while 40% reported being the objects of expletives within the digital domain. See Biryonut Bebeit-Hasfer [BEIHAS] U'Ba'Merchav Ha'Vertu'ali Be'Kerev Yeladim, [Bullying at School and within the Virtual Domain among Children – Report of Findings], THE SARID INSTITUTE (2015), https://www.isoc.org.il/wp-content/uploads/2015/06/bullying_2015.pdf.

⁸¹ See The blue whale game as discussed in *supra* note 7.

⁸² The topic is of great importance and is deliberated frequently by the Knesset (the Israeli parliament). In July 2015, Israeli Minister of Justice Ayelet Shaked appointed a committee chaired by former Supreme Court Justice Edna Arbel charged with combatting the phenomenon of denigration and verbal abuse on the Internet in general and on social networks in particular. The committee's conclusion have yet to be published and the Knesset's deliberations have not led to actions on the ground aimed at countering the phenomenon. In a manner more focused on children, the Israeli Ministry of Public Security announced (in January 2016) that it intends to establish an array of services aimed at preventing Internet-based violence and criminality against minors. In the first phase, it plans to establish a 24-hour hotline for reporting online offenses, and to establish a dedicated police unit targeted with the prevention of offenses against minors. In this respect, see Itai Blumenthal, *נגד אלימות ברשת "מוקד 24 שעות" ו"כפתור חירום" נגד אלימות ברשת* [A 24 hour hotline and an emergency button against internet violence], YNET, <http://www.ynet.co.il/articles/0,7340,L-4753654,00.html> (last updated 17.01.16, 00:54). This array is meant for coping with the full range of criminality against minors including sex offenders, pedophiles and gambling-related criminality. The focus on minors is correct, but we believe that there should also be a focus on the

4. Technology Matters

We argue that in order to create an effective legal policy to mitigate cyberbullying technology has to be considered as an inseparable factor. The medium – the Internet domain – affects the methods in which cultural meanings are produced and gives rise to a reality which may be referred as the “digital state.”⁸³ The ability to create information, to store, replicate and convey it, as well as the ability to easily manipulate and change this information through the use of social networks, not only permits cyberbullying but also enhances its existence. Harmful and offensive behavior in the digital domain possesses unique characteristics: we are concerned with a behavior that is entirely unencumbered by time and space, that does not expire, whose target audience is unlimited and occasionally unknown, and whose associated messages are amenable to unlimited modification and shaping. The convenient and immediate use of social networks allows cyberbullies to manufacture wide-ranging and extensive harms that are intensified by the relevant technology’s specific characteristics.

In these respects, the Internet as a technology and social networks as a technological platform act as what is referred to as a “defining technology”⁸⁴ in the sense that technological domain actually defines the unique characteristics of the behavior we seek to eliminate. Indeed, the concept of “[the] medium is the message” becomes all the more relevant in this case.⁸⁵ The Internet’s characteristics shape and affect the behaviors which take place within it, rendering them an inseparable part of the message. The Internet as a medium imbues the user with the power to generate a massive non-specific audience that would be exposed to an unlimited period of harmful and violent behavior, as well as with the tools for recruiting more and more individuals to partake in her or his violent act.⁸⁶ These are all unique characteristics that are imbedded in Internet’s use in general and social networks in particular—which act as an inseparable part of the harm and the damages

minors themselves as the perpetrators of the offense and that minors should be the subject of a dedicated discussion that would pertain to them as both a harmed and an offense-perpetrating population.

⁸³ Shulamit Almog, *Windows and ‘Windows’: Reflections on Law and Literature in the Digital Age*, 57 U. OF TORONTO L. J. 756 (2007).

⁸⁴ *Id.* at p. 780.

⁸⁵ A term coined by Marshall McLuhan, one of the founding fathers of media studies. See MARSHALL MCLUHAN & QUENTIN FIORE, *THE MEDIUM IS THE MESSAGE* (2001).

⁸⁶ Passive participants may become harming parties by sharing the violent act with their friends or by clicking the “Like” button. Data published in 2015, for example, suggest that 43% of Israeli adolescents aged 12-17 had shared, “Liked” or distributed pictures containing harmful content within the digital domain. See the collection of data included in Yeladim Be’Yisra’el – 2015 [Children in Israel – 2015], NATIONAL COUNCIL FOR THE CHILD (24.12.15), <https://storage.googleapis.com/ch2news-attach/2015/12/%D7%A2%D7%99%D7%A7%D7%A8%D7%99%D7%94%D7%93%D7%95%D7%97.doc>.

it leaves in its wake in and of themselves,⁸⁷ and act both as amplifiers and enablers of harmful behavior.⁸⁸

The meaning of traditional law, as known in the physical domain, can occasionally change dramatically when it is shifted to a digital environment, and might thus demand a new definition of undesirable Internet behaviors such as to require an extension of criminal law.⁸⁹ As a matter of fact, an examination of cyberbullying through the prism of the technology's unique characteristics reveals that we must recognize the fact that the medium itself—the Internet domain—acts as a separate component which plays a part in the intensification of this very violence. We thus argue that technology plays a part in shaping a kind of harmful bullying behavior that is so substantively unlike “traditional bullying” (harm which is committed in the physical domain) that it merits a theoretically, practically and legally distinct definition that will take into consideration the technology itself. As a matter of fact, many cases of online violence require special handling such as a dedicated treatment of the phenomenon in criminal law or – at the very least – an adaptation of existing law to this new behavior. In the present era, technology is thus transformed into one of the characteristics necessary for the very existence of online violence and obviously plays a part in its spread and distribution, which gives rise to an unprecedented degree of damage.

It goes without saying that we do not ascribe violence among children and youth to technology. Violence existed and was commonplace amid them long before the age of social networks and still exists besides them.⁹⁰ Besides this, we do argue that the nature and characteristics of Internet use – and particularly social network use – facilitates the existence of the harmful visual and textual group discourse and even encourages it. Moreover, there is an extensive legal and discourse which has in turn given rise to several schools of thought pertaining to the mutual relations between technology and society.⁹¹

⁸⁷ Thus, for example, a 14-year-old girl became the victim of online violence in a Facebook group entitled “Critiques, Statuses, The Original Love Me,” which at the time included 90,771 members. The girl related how “everyone insulted me, even people who didn’t know me” after another girl uploaded a pornographic video to the group in which she pasted the victim’s face over one of the actresses’ and included captions naming the victim. In turn, this mass video rapidly gave rise to vicious responses which unfolded over dozens of posts and humiliated the victim “nationwide” (according to the victim herself) in a very painful manner. This hate group is an extreme example of technology’s power to distribute violent content to tens of thousands of people. However, any cases of online violence whatsoever make use of the medium’s capacity to rapidly distribute information to a vast number of individuals, whether visually or textually. See Liron Shamam, Ha’Ketovet ‘Al Ha’Kir [The Writing on the Wall], MAKO (11.4.2013), <http://www.mako.co.il/nexter-weekend/Article-6554514438eed31006.htm>.

⁸⁸ See KOWALSKI, ET AL., *supra* note 18.

⁸⁹ Almog, *supra* note 83 at. 15-18.

⁹⁰ HEIMAN ET AL., *supra* note 41, at p. 36, reveals that 49% of Israeli children have experienced physical violence.

⁹¹ The Social Construction of Technology (SCOT) approach, for example, points to the effects of society and human agents on technology. See YUVAL DROR, *Havnaya Chevratit Shel Technologia: ‘Al Ha’Derech She’ba ‘Arachim, Chok Ve’Achifa Mootma’im Be’Technologia* [The

However, and regardless of any particular school of thought, it is clear we are concerned with a widespread social phenomenon fed by technology itself, which acts by virtue and on the basis of its characteristics, and this socio-technological combination gives rise to the harmful reality the present article seeks to define and with respect to which the article seeks to outline a policy that would bring about said harmful reality's elimination.

Aspects of the technology itself such as textuality,⁹² availability, accessibility, and immediacy contribute toward widespread⁹³ and indefinite distribution of offensive content.⁹⁴ Behaviors that accompany use of social networks such as anonymity,

Social Construction of Technology: On the Manner in Which Values, Laws, and Enforcements Are Embedded in Technology], in RESHET MISHPATIT [LEGAL NETWORK] 79, 80 (2011). Another school of thought has been referred to as the "Social Shaping of Technology" (SST) approach. This approach argues for a tight-knit relation between society and technology such that the two intermingle and feed off each other to the extent of becoming a single system – a "socio-technological" system. See OREN BERACHA, *Hale Ve'Foucault Ba'Merchav Ha'Digitali: Koach, Technologia, U'Mishpat Be'Chevrat Ha'Meyda [Hale and Foucault in the Digital Sphere: Power, Technology and the Law in the Information Society]*, in RESET MISHPATIT [LEGAL NETWORK] 117, 119 (2011).

⁹² Studies have also revealed that certain configurations of online violence – particularly those in which the harmful message is visual in nature, i.e. an image or video – may lead to the victim suffering more harm than in traditional (physical) bullying. Yalda T. Uhls, *Cyberbullying has a Broader Impact than Traditional Bullying*, in *Cyberbullying* (Louise I. Gerdes, ed. 2012). At Issue Rpt. From *Is Bullying Going Digital? Cyber Bullying Facts*, PSYCHOL. IN ACTION (2010).

⁹³ The option of sending harmful or humiliating content to an immense amount of people in a very short period of time alongside the accessibility of electronic devices at any time and at any place give rise to a 'virally' propagated method of communication. INBAR TSUR ET AL., *Biryonut Ba'Reshet Be'Kerev Beney No'ar 'Ovrey Chok, Ha'Metupalim Be'Sheyrit Ha'Mivchan La'No'ar [Cyberbullying among Young Offenders Cared for by the Juvenile Probation Service]*, XXXVI(1) CHEVRA U'REVACHA [SOCIETY AND WELFARE] 37-68, 40 (2016), <http://www.molsa.gov.il/CommunityInfo/Magazine/Lists/ArticlesList/Attachments/1550/36-1-zur-i-etc.pdf>. The Internet's availability, in turn, contributes toward the widespread distribution of uploaded harmful content to a large number of people and within a short period of time. HEIMAN, ET AL., *supra* note 41. Moreover, focusing on the legal perspective the availability and immediacy of distribution also affects the execution of criminal thoughts in a manner that is unlike its physical domain equivalent. Indeed, the time that elapses between the formation of a criminal thought and its execution adds up and is reduced to a momentary decision. Unlike a situation in which the contemplation of evil criminal thoughts is "a Passion so adhaerent to the Nature both of a man [...] as to make it a Sinne, were to make Sinne of being a man." THOMAS HOBBS, *LEVIATHAN* at 336 (1985).

⁹⁴ Since most online communication is conducted in writing, it is also saveable, documentable, and retrievable. This is also why it is difficult to remove uploaded content, and why the harassment's digital traces remain online indefinitely. Hedy Vagshal, *Biryonut Ba'Reshet [Cyberbullying]*, BITACHON PENIM [INTERNAL SECURITY] 34, 35 (2013).

⁹⁵disinhibition, ⁹⁶ contribute to harmful group conduct. ⁹⁷ These characteristics not only enhance the behavior they also produce accompanying social ills that hardens addressing cyberbullying as a phenomenon. Specifically they create a realm that is not adequately supervised by adults,⁹⁸ and has significantly low practices of reporting harm.⁹⁹The

⁹⁵Anonymity is said to imbues harasser with a sense of security as she or he hides behind a fictitious identity with no fear of being caught and a lesser sense of social responsibility. See Sameer Hinduja & Justin W. Patchin, *Bullies Move Beyond the Schoolyard: A Preliminary Look at Cyberbullying*, 4(2) YOUTH VIOLENCE AND JUVENILE JUSTICE 148 (2006). It should be noted, however, that this anonymity characteristic *per se* is irrelevant to the present article that focuses on online social network violence among children and youth who usually belong to the same school, youth movement, or neighborhood community.

⁹⁶ The online domain that acts as a mediational medium and which gives rise to an illusion of anonymity alongside invisibility and the distance between the discourse participants contribute toward the occurrence of a disinhibition phenomenon which manifests as less restrained behavior, openness, authentic sharing, and an heightened expression of emotions and needs that are often concealed, such as the expression of severe criticism or anger and hate. Meyran Boniel-Nissim, *Me'afyeney Ha'Tikshoret Ba'Internet [Characteristics of Internet Communication]*, SHEFINET (2013), <http://cms.education.gov.il/NR/rdonlyres/7618EA9F-94B8-4C9D-8F55-19FE6C818B0A/88036/mefyaneiTikshoretbeinternet.pdf>.

⁹⁷ The group – the communication forum itself – is another factor which contributes to harmful behavior over and above the technology which – as noted above - allows harms to be inflicted with far greater ease and which intensifies the damage thus caused. Specifically, the group erodes the individual self through a process of deindividuation and begins to exhibit aggressive and less normative communicative behavior as well as certain patterns of antisocial behavior. See Bernard Guerin, *Social Behaviors as Determined by Different Arrangements of Social Consequence: Social Loafing, Social Facilitation, Deindividuation, and a Modified Social Loafing*, 49 PSYCHOL. REV. 565, 566 (1999).

⁹⁸ Indeed, children are not subjected to any form of supervision within the online domain as a whole and within social networks in particular. Furthermore, parents are considered 'digital immigrants' while children are considered 'digital natives.' JOHN PALFREY & URS GASSER, BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES 3-4 (2008). See also Mark Prensky, *Digital wisdom and homo sapiens digital*, in DECONSTRUCTING DIGITAL NATIVES: YOUNG PEOPLE, TECHNOLOGY, AND THE NEW LITERACIES 15-29 (Michael Thomas ed., 2011).

Moreover, asking for parental assistance is often not an option available to children in most cases of online harm. Tsur et al., *supra* note 93, at p. 41.

Moreover, parents and teachers' reactions contribute toward the continued existence of online violence. Studies reveal that teachers do not react to cases of online violence at all, or that they react in an incompatible fashion. Children, in turn, interpret this lack of reaction on their teachers' part as indicating the latter party's assent to their violent conduct. See Dorothea Anagnostopoulos et al., *School Staff Responses to Gender-Based Bullying as Moral Interpretation: An Exploratory Study*, 23(4) EDUCATIONAL POLICY 541 (2009).

⁹⁹ Studies reveal that children would rather use the Internet itself to seek assistance than any other means. Twenty five percent of Israeli children up to the age of 17, for example, contacted online assistance services as opposed to a mere two percent who contacted phone-based assistance services. Edith Manny-Ikan et al., *Beney No'ar Ba'Reshet – Mesukanut Ve'Hizdamnut Le'Tipul: Sekirat Sifrut Ve'Ra'ayonot 'Im Anshey Mafteach [Young Adults on the Internet – Dangerousness and An Opportunity for Care: A Literature Review and Series of Interviews with Key Figures in*

characteristics of technology combined with the lack of adequate supervision of social networks and low practice of report create an environment that is perceived by children far more dangerous than the physical realm.¹⁰⁰

In sum, all the characteristics – technological and otherwise – which we have listed above might explain the intensity of the harms inflicted by cyberbullying and the need for a re-thinking of the phenomenon's definition and reframing legal policy which surrounds it. On the one hand, technology has led to a reduction in the costs of anti-social and destructive behavior given that the very act of inflicting harm has become easier, and on the other hand has also led to the infliction of severe and intense harm on the victim with severer implications since such violent communication has become more vulgar, more aggressive, and more widespread.¹⁰¹ Technology has also brought about a reduction in the cost of violent behavior on account of both immediacy and ease of transmission as well as due to the reduction of the amount of time elapsing between the thought of committing a harmful act and the harmful act's actual commission. These reductions have led to the

the Field] 11-13 (2016),

<https://www.btl.gov.il/Funds/kolotkorim/Documents/skiratsafrotcyberbullying.pdf>.

The main action strategies employed by children when they experience the infliction of online harms or taunting are asking the assistance of a family member (20%), asking the harming party to stop her or his actions (17%), distancing themselves from the harming party (15%), and finally, asking members of their school's staff for assistance (12%). It is worth comparing these data to their traditional bullying equivalent, where 43% of the children harmed on school premises contact members of the school staff for assistance. See Amos Rolider & Meyran Boniel-Nissim, *בריונות בבית"ס ובמרחב הווירטואלי בקרב ילדים [Bullying at School and within the Virtual Domain Among Children: A Report of Findings]* THE SARID INSTITUTE (2015), https://www.isoc.org.il/wp-content/uploads/2015/06/bullying_2015.pdf.

Data published at the end of 2016 by the Israel National Council for the Child suggest that a significant percentage of the children who were harmed by online violence chose not to report this fact: 40% of the victims did not contact anyone for help and did not tell anyone about their experiences. 63% of the victims who chose not to report their experiences noted that they refrained from reporting because doing so did not seem to be important enough. *המועצה הלאומית לשלום הילד השנתון הסטטיסטי "ילדים בישראל 2016" לקט נתונים [Compilation of data from the "Children in Israel – 2016]* ISRAEL NATIONAL COUNCIL FOR THE CHILD (2016), http://fs.knesset.gov.il/20/Committees/20_cs_bg_367605.pdf.

Sadly, even when the children's environment is aware of cases of online violence, it often does not address them seriously since they take place in the virtual rather than the physical world and are perceived as being less invasive than cases of physical violence. Cheryl Terrance et al., *Perceptions of Peer Sexual Harassment Among High School Students*, 51(7-8) SEX ROLES 479 (2004).

¹⁰⁰ Liat Franco & Shulamit Almog, *Precarious Childhood: Law and its (Ir)relevance in the Digital Lives of Children* 7(1) Penn State J. of L. & Int'l Aff. (2019). This article was based on a qualitative research consisting of 66 interviews of 8th and 9th grades students. The results of this study suggest that children in general are not aware of existing relevant law that pertain to their online conduct or of children's rights in the digital domain. Moreover, this research suggests that children tend to perceive the digital domain as a lawless, unsafe, and unprotected territory.

¹⁰¹ Stacy M. Chaffin, *The New Playground Bullies of Cyberspace: Online Peer Sexual Harassment*, 51 HOWARD L. J. 773, 774 (2008).

increasing number of harmful acts committed within the online domain which were – more often than not – committed distractedly and with little forethought.¹⁰² In addition, technology has also increased the extent of the damage caused by cyberbullying as well as the intensity of harm inflicted on the victim due to the ability to reach a wider audience of social network ‘friends’ on account of both the harmful message’s visual nature as well as its replicability inherent nature. A push of a button, therefore, allows the commission of severe violence with severe implications on both the victim and those around her or him. These changes in the balance of cost and damage might thus indicate the need for a different legal response to the phenomenon than those offered thus far.¹⁰³

Having briefly described the characteristics of children’s use of social networks, focusing on technology characteristics, and reviewed the extent and implications of the phenomenon, we are led to the issue of the existing legal frameworks addressing cyberbullying and describing which models are available to the justice system in coping with this phenomenon.

B. Legal Aspects of Handling Online Violence

Since the extent of online violence among children is massive, some even claim that it has reached epidemic proportions,¹⁰⁴ and since Internet use is only expanding, it is certainly possible to argue that we are concerned with a widespread and worrisome phenomenon meriting a proper response. Furthermore, as noted above, there is no uniform definition of cyberbullying, a state of affairs which impairs legislators’ and enforcement bodies’ capacity to cope with this phenomenon.

We shall now turn to reviewing legal frameworks that relate to cyberbullying. In our view two models exist – theoretically speaking – the model which defines the phenomenon as a single criminal offense of “cyberbullying” (or some other similar term) and creates dedicated new criminal and civil legal categories for the purpose of eliminating online violence, and the model concerned with handling cyberbullying within existing frameworks of criminal offenses pertaining to the physical domain.

1. Models for Treating Online Violence Among Children and Youth

(a) “The Dedicated Cyberbullying Offense” Model

We have chosen to refer to the model in which legislatures choose to institute dedicated legislation for the purpose of handling online violence as the “dedicated legislation model.” Consider Austria, for example, as a country that has chosen the

¹⁰² Mark Franek, *Foiling Cyberbullies in the New Wild West*, 63 EDUC. LEADERSHIP 39-40 (Dec. 2005/Jan. 2006).

¹⁰³ Neal Kumar Katyal, *Criminal Law in Cyberspace*, 149 U. PENN. L. REV. 1003, 1006 (2001).

¹⁰⁴ See Kahana, *supra* note 39.

dedicated offense model for the purpose of addressing cyberbullying.¹⁰⁵ Austrian law defines cyberbullying in §107(c) of the Austrian Penal Code as “continuous harassment by telecommunication or a computer system.” This law entered into force on the 1.1.2016 and provides that any person who harms another person’s reputation in front of a large number of people, or makes facts or images pertaining to a person’s domain of intimate life available to a large number of people without said person’s consent by means of a telecommunication system or computer software application and in a manner calculated to inflict serious harm on a person’s way of life for a long period of time is punishable by one year’s imprisonment or a fine equivalent to 720 days’ income. Subsection (b) provides that an act that leads to the suicide or attempted suicide of said person is punishable by three years’ imprisonment.¹⁰⁶ Subsection (b) in particular was considered to be a more severe alternative compared to the basic offense defined in subsection (a).¹⁰⁷ The social value protected by this offense, in turn, is the freedom of pursuing one’s way of life (die Freiheit der Lebensführung).¹⁰⁸ The law was primarily meant for protecting children and youth from online violence.¹⁰⁹

The Austrian legislation came into being after studies had indicated that Austria was the country with the worst online violence problem in the European Union, with every second child being a victim of some form of online violence.¹¹⁰ Austrian legislators were of the opinion that the existing penal prohibitions present in Austrian law (defamation, violation of privacy, intimidation, harassment, sexual harassment) did not provide a sufficient degree of protection against the cyberbullying phenomenon, which was why an independent criminal offense of cyberbullying was necessary for (among other things) the purpose of conveying the phenomenon’s severity to the Austrian public.¹¹¹

¹⁰⁵ See Petra Gradingner, *Cyberbullying: Mobbing im neuen Medien* [Cyberbullying: New Media Mobbing] 12 (unpublished Ph.D. Dissertation, University of Vienna, 2010) (on file with http://othes.univie.ac.at/13851/1/2010-07-01_9026211.pdf).

¹⁰⁶ See Bundesrates [BR] [Federal Council] 9403 der Beilagen zu den Stenographischen Protokollen des Bundesrates [9403 of the supplements to the Stenographic Protocols of the Federal Council], Aug. 09, 2015, https://www.parlament.gv.at/PAKT/VHG/BR/I-BR/I-BR_09403/fname_436717.pdf (Austria).

¹⁰⁷ See *Id.*

¹⁰⁸ See Thomas Reisinger, “Cybermobbing” – An Analysis of §107c of the Austrian Penal Code [“Cybermobbing” – Eine Analyse von §107c StGB], JUSIT, 169, 170 (2015).; Wiener Kommentar zum Strafgesetzbuch Schwaighofer in Vienna Commentaries on the Austrian Penal Code, 2nd Edition [, 2. Auflage], (published by Höpfel/Ratz, Vienna 2016) [(herausgegeben von Höpfel/Ratz, Wien 2016), §107(c), ¶1 [in German].

¹⁰⁹ *Austria Cracks Down on Cyber Abuse*, THE LOCAL (4 January 2016), <http://www.thelocal.at/20160104/austria-cracks-down-on-cyber-abuse>.

¹¹⁰ Austrian legislators were of the opinion that cyberbullying gives rise to some very severe harms and to the occasional destruction of the actual victim’s personality – primarily because we are concerned with an online publication which ends up being very easily accessible to the general public and which remains accessible permanently or at least for a very long time. See *Id.*

¹¹¹ *Id.*

New Zealand also passed a dedicated cyberbullying offence on July 2, 2015. This law, entitled ‘The Harmful Digital Communications Act’,¹¹² sought to handle the cyberbullying phenomenon, while §22 of this Act, entitled ‘Causing harm by digital communication,’ defines cyberbullying as an independent offense.¹¹³ The language of the law suggests we are concerned with a consequential offense with a special *mens rea* of intent, with damage being defined as ‘serious emotional distress ‘accompanied by two years’ imprisonment or a fine of up to 50,000 New Zealand Dollars.’¹¹⁴ In determining the severity of the acts in question, the Court would be required to consider, among other things, the extremity of the language used, the age of the victim, the intensity of the activity – i.e. whether we are concerned with a recurring activity, and the truthfulness/untruthfulness of the claim brought before it. Furthermore, New Zealand may also apply offenses from the physical domain. However, according to then New Zealand Minister of Justice Amy Adams, these would only be applied when Courts are asked to address harms of extreme severity.¹¹⁵

Section 127 of England’s 2003 Communications Act, entitled ‘Improper use of public electronic communications network’ is also a dedicated cyberbullying offence addressing cyberbullying,¹¹⁶ whose scope encompasses the transmission of any kind of

¹¹² Harmful Digital Communications Act 2015.

¹¹³ According to which:

"(1) A person commits an offence if—

(a) the person posts a digital communication with the intention that it cause harm to a victim; and
(b) posting the communication would cause harm to an ordinary reasonable person in the position of the victim; and

(c) posting the communication causes harm to the victim.

(2) In determining whether a post would cause harm, the court may take into account any factors it considers relevant, including—

(a) the extremity of the language used;
(b) the age and characteristics of the victim;
(c) whether the digital communication was anonymous;
(d) whether the digital communication was repeated;
(e) the extent of circulation of the digital communication;
(f) whether the digital communication is true or false;
(g) the context in which the digital communication appeared.

(3) A person who commits an offence against this section is liable on conviction to,—

(a) in the case of a natural person, imprisonment for a term not exceeding 2 years or a fine not exceeding \$50,000;

(b) in the case of a body corporate, a fine not exceeding \$200,000.

(4) In this section, victim means the individual who is the target of a posted digital communication."

Harmful Digital Communications Act 2015, s 22 (N.Z.).

¹¹⁴ *Id.*

¹¹⁵ Amy Adams Defends anti cyber-bullying bill as critics say free speech will be criminalized, NBR (21 Jun 2015), <https://www.nbr.co.nz/article/amy-adams-defends-anti-cyber-bullying-bill-critics-say-free-speech-will-be-criminalised>.

¹¹⁶ England also applies physical domain offenses such as harassment to online violence over and above the aforementioned dedicated law.

harmful message.¹¹⁷ Here also, what we are concerned with is a very wide-ranging offense. European Union countries other than England generally handle cyberbullying through existing legislation and no comprehensive EU legislative item addressing this issue presently exists other than several policy documents that call upon legislators to find a common definition to the phenomenon and act toward mitigating it.¹¹⁸

In the U.S. as of 2017, 48 States include the term ‘cyberbullying’ in their statutes, with seven of these choosing the single dedicated offense model for handling this behavior.¹¹⁹ However, these States have also applied a wide range of definitions to cyberbullying as well as an equally wide range of penalties. As of 2016, all US states have

¹¹⁷ According to which:

“(1) A person is guilty of an offence if he—

(a) sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or

(b) causes any such message or matter to be so sent.

(2) A person is guilty of an offence if, for the purpose of causing annoyance, inconvenience or needless anxiety to another, he—

(a) sends by means of a public electronic communications network, a message that he knows to be false,

(b) causes such a message to be sent; or

(c) persistently makes use of a public electronic communications network.

(3) A person guilty of an offence under this section shall be liable, on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale, or to both.

(4) Subsections (1) and (2) do not apply to anything done in the course of providing a programme service (within the meaning of the Broadcasting Act 1990 (c. 42)).”

Communications Act 2003, c. 21, § 127 (Gr. Brit.),

<https://www.legislation.gov.uk/ukpga/2003/21/section/127>.

¹¹⁸ See Pozza et al., *supra* note 17. This general statement does not include Italy, who in 2017 enacted a law which provides that children who are victims of online violence may act swiftly to ensure that the harmful message is removed. Priya Joshi, *Italy Unanimously Passes Anti-Trolling Law to Protect Children from Online Abuse*, INTERNATIONAL BUSINESS TIMES (May 17, 2017), <https://www.ibtimes.co.uk/italy-unanimously-passes-anti-trolling-law-protect-children-online-abuse-1622116>. It should be noted that this law contains a mechanism for the removal of harmful messages but does not specify criminal or tortious sanctions and it was enacted in response to a severe cyberbullying case that ended up in a suicide of a 14 year old- who received some 2,600 denigrating and disparaging messages on the day of her suicide by means of WhatsApp. Ben Wedeman, *Facebook May Face Prosecution Over Bullied Teenager’s Suicide in Italy*, CNN BREAKING NEWS (July 31, 2013), <http://edition.cnn.com/2013/07/31/world/europe/italy-facebook-suicide>.

¹¹⁹ These seven States are Arkansas, Louisiana, Missouri, Nevada, North Carolina, Tennessee and Washington. See Tiffany Surmall, *Lethal Words: The Harmful Impact of Cyberbullying and the need for Federal Criminalization*, 53 Hous. L. Rev. 1475, 1490 (2016); Sameer Hinduja and Justin W. Patchin, *State Cyberbullying Laws: A Brief Review of State Cyberbullying Laws and Policies*, CYBERBULLYING RES. CENT. (2018), <http://cyberbullying.org/Bullying-and-Cyberbullying-Laws.pdf>. Most US states that do not criminalize this behavior with dedicated legislation pass laws and regulations addressing schools with a view to the creation of school policies that would be able to handle cyberbullying. *ibid.*, at p. 1492.

passed laws meant for the prevention of violence,¹²⁰ and all states except Montana have instituted cyberbullying laws that require schools to shape and enforce a school policy that would effectively handle cyberbullying inflicted on children.¹²¹ The range of definitions applied to cyberbullying behaviors as well as the associated penalties is wide. In Louisiana, for example, cyberbullying is defined as the electronic transmission of a text, whether visual, oral or written with malicious intent and the desire to coerce, torment, intimidate and harm a minor under 18 and is punishable by a 500 USD fine or six months' imprisonment.¹²² In Arkansas, however, this behavior is defined and classified as a misdemeanor, is not limited to minors, and defines cyberbullying as an electronic communication calculated to scare, coerce, terrorize, intimidate, abuse or harass another person. Missouri, one of the first States to criminalize cyberbullying,¹²³ provides another variance in U.S. state laws and criminalized cyberbullying to include behaviors such as online terrorizing, intimidation, and the infliction of emotional distress.¹²⁴ The Missouri law was deliberated by the U.S. Congress with a view to turning it into a Federal Law. This process, however, ended up being unsuccessful for several reasons, with the main reason being that the proposed Bill was considered unconstitutional since it harmed the freedom of expression.¹²⁵ However, it should also be noted that some writers have recently called for the federal regulation of the cyberbullying phenomenon.¹²⁶

In addition to the variance in U.S. state laws, there are also regional and local laws (statutes) that prohibit cyberbullying. Albany County in New York State, for example, passed a specific statute on cyberbullying in 2014, where it defines it as an action intended to harm another, including via the publication of a private photo of a sexual nature, or as the use of a child's name or likeness with the intent of harming her or him, punishable by a 1,000 USD fine or one year's imprisonment.¹²⁷ Another county that passed a dedicated

¹²⁰ Joseph J. Sabia & Brittany Bass, *Do anti-bullying laws work? New evidence on school safety and youth violence*, 30(2) J. OF POPULATION ECON., 473-502 (2017).

¹²¹ *Bullying Laws Across America*, CYBERBULLYING RES. CEN., <https://cyberbullying.org/bullying-laws>.

¹²² "Cyberbullying is the transmission of any electronic textual, visual, written or oral communication with the malicious and willful intent to coerce, abuse, torment, or intimidate a person under the age of eighteen... whoever commits the crime of cyberbullying shall be fined no more than five hundred dollars, imprisoned for not more than six months, or both." 2010 La. Acts No. 989, §1, <http://legis.la.gov/Legis/Law.aspx?d=725180>.

¹²³ This law was enacted in response for the suicide of Megan Meier and was termed 'the Megan Meier Cyberbullying Prevention Act'.

¹²⁴ *Missouri*, STOPBULLYING.GOV, <https://www.stopbullying.gov/laws/missouri/index.html>

¹²⁵ See Alison Virginia King, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for both Teens and Free Speech*, 63(3) VANDERBILT LAW REVIEW, 845, 864 (2010).

¹²⁶ See Surmall, *supra* note 119, at 1497.

¹²⁷ See:

"(a) A person commits the offense of cyber-bullying if: (1) He or she maliciously engages in a course of conduct by electronically transmitting information not of public concern with intent to inflict emotional harm on a minor; or (2) he or she electronically transmits private sexual information about a minor with the intent to inflict emotional harm on the minor; or (3) he or she

regional law is Vernon County in the State of Wisconsin. Its statute defined cyberbullying as electronic communication calculated to annoy, harm, taunt, belittle or disparage without a legitimate purpose. It is punishable by a 50 to 500 USD fine or a period of imprisonment.¹²⁸

Canada, in turn, passed the Cyber Safety Act in 2013,¹²⁹ which was also named “Rehtaeh’s Law” in memory of a bullying victim who committed suicide.¹³⁰ A violation of this law may be criminal, in which case it is punishable by six months’ imprisonment and/or a fine of up to 5,000 CAD;¹³¹ and might also be civil claim, which allows a plaintiff to file suit for damages.¹³² A new law, the Protecting Canadians from Online Crime Act,¹³³ whose main objective was the prohibition of distributing intimate images without consent, was passed in 2015¹³⁴. The images in question must have been taken such that the subject

electronically transmits a sexually explicit photo of a minor with the intent to inflict emotional harm on the minor; or (4) he or she electronically transmits false sexual information concerning a minor with the intent to inflict emotional harm on the minor; or (5) he or she, by electronic transmission, maliciously appropriates a minor’s name or likeness with the intent to inflict emotional harm on the minor” ALBANY COUNTY STAT. Local Law No. “F” (2014), http://app.albanycounty.com/legislature/resolutions/2014/20140908/2014-LL_F.pdf.

¹²⁸ “with the intent to annoy, offend, demean, ridicule, degrade, belittle, disparage or humiliate any person and which serves no legitimate purpose.” Wisconsin Stat. County of Vernon Ordinance No. 2012-3 (2012), <https://www.popehat.com/wp-content/uploads/2012/12/VernonWIordinance.pdf>.

¹²⁹ The law defines cyberbullying in §3(b):

“cyberbullying” means any electronic communication through the use of technology including, without limiting the generality of the foregoing, computers, other electronic devices, social networks, text messaging, instant messaging, websites and electronic mail, typically repeated or with continuing effect, that is intended or ought reasonably be expected to cause fear, intimidation, humiliation, distress or other damage or harm to another person’s health, emotional well-being, self-esteem or reputation, and includes assisting or encouraging such communication in any way.” Cyber-safety Act c. 2, §3 (Gr. Brit.), <https://www.canlii.org/en/ns/laws/stat/sns-2013-c-2/latest/part-1/sns-2013-c-2-part-1.pdf>.

¹³⁰ Melanie Patten, *Cyberbullying Law Inspired by Rehtaeh Parsons Takes Effect in N.S.*, CTV NEWS (Au. 7, 2013), <http://www.ctvnews.ca/canada/cyberbullying-law-inspired-by-rehtaeh-parsons-takes-effect-in-n-s-1.1401106>. In this case, a 17 year old girl committed suicide after a nude picture of her was distributed in her Nova Scotia Province school.

¹³¹ See An Act to Address and Prevent Cyberbullying, S.C. 2013, c 2, BILL NO. 61 §19 (Can.), <https://nslslegislature.ca/sites/default/files/legc/PDFs/annual%20statutes/2013%20Spring/c002.pdf>.

¹³² See *Id.* at §21-22.

¹³³ An Act to amend the Criminal Code, the Canada Evidence Act, the Competition Act and the Mutual Legal Assistance in Criminal Matters Act, S.C. 2014, c 31 (Can.), <http://www.parl.ca/DocumentViewer/en/41-2/bill/C-13/royal-assent/page-4>.

¹³⁴ *Id.*, §3:

- “(2) In this section, “intimate image” means a visual recording of a person made by any means including a photographic, film or video recording,
- (a) in which the person is nude, is exposing his or her genital organs or anal region or her breasts or is engaged in explicit sexual activity;
 - (b) in respect of which, at the time of the recording, there were circumstances that gave rise to a reasonable expectation of privacy; and

could have reasonably expected privacy during its production and such that the subject had not foregone her or his privacy interest in the course of its distribution. The penalty for this offense is five years' imprisonment.¹³⁵

1. Criticism of the Dedicated Cyberbullying Offense Model

Since dedicated legislation for handling online violence among children and youth is relatively new, there are few studies that have examined their efficacy and the extent of their influence on the elimination or mitigation of cyberbullying. One U.S. study that examined the efficacy of these dedicated laws in the U.S. focused on data pertaining to the level of reporting of cyberbullying incidents among children and youth since most of the U.S. laws addressing this phenomenon are concerned with the institution of mandatory reporting in cases of online violence,¹³⁶ and found a 12% increase in the amount of reported cases of school violence.¹³⁷

However, and despite the increase in the extent to which cases of cyberbullying among children are reported, difficulties are still present in estimating the influence and deterrent effect of cyberbullying laws. There are a number of reasons for this. For one thing, the number of incidents of cyberbullying is difficult to estimate on account of the characteristics of the relevant technology as discussed in the previous chapter (underreporting, the violence is often carried out outside school premises and beyond the scope of adult supervision).¹³⁸ For another, the growing use of smartphones, and the increased accessibility of the Internet as a whole and social networks in particular to children and youth increases the amount of cyberbullying incidents and makes it difficult to estimate the effect of anti-online-violence laws on the extent of such cases in such mutable circumstances.¹³⁹ Thirdly, courts find it extremely difficult to implement and enforce the criminal sanctions associated with online violence-related offenses for a number of reasons. These include, among others, the conflict present between the criminalization of such behaviour and other values such as the freedom of expression,¹⁴⁰ the difficulty present in identifying the bullies themselves as the perpetrators of the

(c) in respect of which the person depicted retains a reasonable expectation of privacy”

¹³⁵ *Id.* at §3(1)(a).

¹³⁶ Hinduja & Patchin, *supra* note 42. It should be noted that Canadian law also applies physical domain offenses, such as the various harassment offenses, intimidation, extortion, incitement to violence and hatred, defamation, and inciting and aiding suicide, to cyberbullying over and above the aforementioned “Canadian Video Law” (i.e. the Protecting Canadians from Online Crime Act 2015).

¹³⁷ One of the study’s limitations was the inability to separate online from traditional violence. See Kabir Dasgupta, *Youth Response to State Cyberbullying Laws*, N. Z. ECON. PAPERS (2018).

¹³⁸ See *supra* notes 32-37.

¹³⁹ Dasgupta *supra* note 137, at 9.

¹⁴⁰ Sameer Hinduja & Justin Patchin, *Cyberbullying: A review of the legal issues facing educators*, 55(2) PREVENTING SCHOOL FAILURE, 71-78 (2011).

offense,¹⁴¹ and the understanding that they are concerned with a serious offense rather than cases of trivial violence among children.¹⁴² These reasons and others lead courts to apply lenient penalties in cases of cyberbullying and to refer the further handling of such cases to schools who can then apply such disciplinary sanctions as suspension. Finally, it is difficult to estimate the extent of anti-cyberbullying laws' influence on account of the fact that the content of such laws differs between U.S. states as described above.¹⁴³ Thus, states with stricter laws can expect the reporting of more cases of online violence since such states would construe more cases of violence as offenses.¹⁴⁴ On the other hand, victims of online violence in 'strict' states would hesitate in pressing charges due to the severe penalty associated with their state's offense of online violence, to their fear of the reactions of parties in their environment that might lead to the initiation of a further round of violence against them, and to their fear of increased parental intervention on account of their victimhood.¹⁴⁵ Finally, some have argued that anti-cyberbullying laws are insufficiently enforced for a number of reasons. These include, among others, these laws' ambiguity on account of the use of nebulous language in defining online violence as an offense, an insufficient understanding of the law, the use of such defences as the freedom of expression, the fear of countersuits being filed by the bully's parents, and the case's silencing in the service of maintaining the good reputations of the school and the city which witnessed the commission of the online violence offense.¹⁴⁶

A 2017 U.S. study that examined the extent of online violence-related laws' effect on children's sense of security within the school environment and on the number of violence cases found that dedicated anti-online-violence laws give rise to negligible changes in children's sense of security and that only comprehensive and powerful

¹⁴¹ Whether the principal (the original perpetrator) should be criminalized alone, or whether all those who shared the harmful message should be criminalized as accessories.

¹⁴² Sameer Hinduja & Justin Patchin, *Measuring Cyberbullying: Implications for research*, 23 AGGRESSION AND VIOLENT BEHAVIOR, 69-74 (2015).

¹⁴³ See elaborative discussion, *supra* notes 119-128.

¹⁴⁴ See Dasgupta, *supra* note 137, at 10.

¹⁴⁵ *Id.*

¹⁴⁶ These reasons were listed by American attorney and cyber law expert Parry Aftab. See *Why Cyberbullying Laws are not Working in the US*. RISE AND STAND (Apr 28, 2014), <http://www.riseandstand.net/why-cyber-bullying-laws-arent-working-in-us/>.

legislation¹⁴⁷ leads to an 8-12% reduction in school violence cases.¹⁴⁸ This study concluded that it is possible that the costs of such comprehensive legislation might exceed the social benefit that may be derived from it.¹⁴⁹ Indeed, the frequency of the phenomenon in other countries such as New Zealand has not changed, and even increased, despite the massive wave of legislation that this country has passed and that we have described above.¹⁵⁰

Alongside the aforementioned difficulty in estimating the efficacy of passing dedicated legislation for the purposes of handling cyberbullying, the many definitions associated with the “dedicated single offence model,” including those employed in Austrian, New Zealand, English and American state laws inhibits difficulties in relation to the fundamental principles of basic constitutional law as well as criminal; as these laws are usually very wide and unclear and include within the numerous social values. Moreover, once analyzing these laws, it is apparent that there is an insufficient recognition of the uniqueness of the online domain from a technological point of view as well as the place it occupies in the lives of children and youth. Lastly, the model is unsuitable to its target population, viz. children and youth as will be further explained.

The laws mentioned above are general and use unfocused definitions of cyberbullying which do not allow us to distinguish between the different social values which underpin the definition of a criminal offense that seeks to eliminate a particular behavior.¹⁵¹ Social values constitute both the core of any criminal offense as well as the

¹⁴⁷ Less than 25% of U.S. states have passed such comprehensive and powerful legislation. See Sabia, *supra* note 120, at p. 484. Moreover, another study has shown that cyberbullying laws’ effectiveness and contribution to the elimination of cyberbullying increases as a function of the clarity of their definition of online violence and the circumstances in which the law applies. See Ashley Welch, *How Well are State Anti-Bullying Laws Working*, CBS NEWS (Oct 5, 2015), <https://www.cbsnews.com/news/how-well-are-state-anti-bullying-laws-working>. A further element that was found to exert an effect on the efficacy of a law in eliminating the phenomenon of online violence among children is whether it contains any reference to regional schools, and whether it requires them to institute and to implement policies that would eliminate this phenomenon. See Virginia Pelley, *Do Anti Bullying Laws Work?* CITY LAB (Oct 28, 2015), <https://www.citylab.com/life/2015/10/do-anti-bullying-laws-work/412285/>.

¹⁴⁸ Sabia, *supra* note 120, at 497-498.

¹⁴⁹ *Id.*

¹⁵⁰ A survey conducted among 15,000 New Zealanders in 2016 found that 2 out of every 5 children and 3 out of every 5 children were the victims of cyberbullying. See Jamie Morton, *Rates of Cyberbullying in New Zealand Alarming*, NEW ZEALAND HERALD (Mar 28, 2016), https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11612551. As noted above, it is difficult to estimate the effect of dedicated legislation on online violence since Internet access rates are constantly increasing alongside the number of online violence cases.

¹⁵¹ We believe that the Austrian prohibition, for example, is very broad, since the offense encompasses all forms of publication, including SMS messages, emails, phone calls, Facebook content, WhatsApp content, Instagram content, MSN Messenger content, etc. that harm a person’s reputation, as well as the publication of any fact or image pertaining to a person’s intimate domain capable of inflicting severe harm on a person’s way of life. This publication may include the distribution of lies, rumours, taunts and disparagements, embarrassing images of a person’s intimate life, threats, harassments, as well as various forms of social exclusion, including

legitimization for its very existence. Thus, when the acts of slander, disparagement, ridiculing, distributing harmful remarks, spreading rumors, distributing lies, conveying harassing messages, conveying intimidating messages, conveying terrorizing messages, extortion, incitement, invading privacy, cyber-stalking, impersonation, deceit, conveying notices of social exclusion, and violating privacy all fall under the definition of “cyberbullying”, the distinctions between social values of varying characters and degrees of severity become increasingly blurred. Legislatures that criminalized cyberbullying might reflect harms inflicted on many social values, such as human dignity, the value of privacy, freedom of action, bodily integrity, the integrity of property, and – in extreme cases – on human life (as expressed in Austrian law).¹⁵² Including wide-ranging behaviors under one offence of cyberbullying does not permit us to distinguish between particularly severe anti-social behaviors that merit and require criminalization and less severe anti-social behaviors that should be handled outside of the criminal system. In other words, a definition involving a cluster of behaviors rather than a single harmful behavior can therefore be seen as exerting an adverse effect on the possibility of conducting the kind juridical deliberation required for the phenomenon’s elimination.

Further, social values are usually the criterion employed in the arrangement of criminal offenses and their division into titles and chapters as is the case in the Penal Code.¹⁵³ Where, then, should we position the general criminal proscription of “cyberbullying”? Within the framework of the Prevention of Defamation Law? The Protection of Privacy Law? As part of the section on intimidation or the section on liberty? In the stalking law? In the Computers Law? Or in the section on killing offenses?¹⁵⁴

the removal of a person from a WhatsApp group or any other type of group communication. *See supra* note 106, at 19. The term “domain of intimate life” (höchstpersönlicher Lebensbereich) is very wide-ranging and encompasses anything that might pertain to a person’s private and family life as defined by Article 8 of the European Convention on Human Rights, such as a person’s sexual life, family life, place of residence, illnesses, disabilities, and ideological or religious worldviews, but not a person’s business and professional life that are protected by anti-property offenses. Reisinger, *supra* note 108.

¹⁵² Put differently, the nature of a protected value and the severity of the harm inflicted upon it may change radically according to the act committed and the characteristics of the platform it was inflicted in. Given this state of affairs, treating the entire range of violent online acts and behaviors within a single theoretical framework might make it difficult to identify the social value protected in each and every case and might even lead to the relinquishment of efforts to distinguish between differing values in the first place. We might thus be left in a position whereby behaviors that harm a supreme social value such as human life might be treated in the same way as harms inflicted on dignity or privacy. Thus, placing the social value of human life besides the social values of a good reputation, privacy and property – might belittle the (supreme) value of human life.

¹⁵³ Such is the case in the Israeli Penal Code

¹⁵⁴ Austrian legislators intended to define the offense as part of the section on offenses against privacy, but a position suggesting that it ought to be included in the section on offenses against liberty eventually prevailed in the course of the Law’s deliberation. *See* Schwaighofer, WIENER

Moreover, a protected social value is a basic and primary benchmark in determining the justified penalty to be applied on account of the criminal offense's commission. A phenomenon defined as a criminal offense would lead to the derivation of a basic penalty that would constitute a retribution for the anti-socialness associated with guilt (the principle of fitness) such that the harm inflicted on the protected social value expresses the greatest degree of anti-socialness. Insofar as the matter under discussion in the present article is concerned, we wish to indicate the error inherent in determining a singular and common basic penalty for harms inflicted on variant social values such harms inflicted on life, bodily integrity, privacy, dignity, or freedom of action.

In addition to the problematic alignment of various social value into one definition of a behavior, defining the phenomenon of “cyberbullying,” as a single criminal offense diminishes the principles of clarity and legal certainty, derived from the principle of legality, which are important constitutional principles. The principles of clarity and legal certainty charge legislators with the duty of defining a criminal proscription in the clearest possible manner such that individuals may be instructed with respect to the proscription against the commission of a certain act. The legislation of an offense which is too general or which does not define the offense such as to include the full extent of its particulars and constituent parts is not capable of conveying a precise message to the public with respect to what the latter must not do. Indeed, doing so harms the “no penalty without warning” axiom. According to the principle of clarity, a penal proscription must constitute an exception to the freedom of action. In other words, any behavior not explicitly proscribed by legislators is permitted, and any exception to this permission must be well-justified, well-defined, and well-delimited. This is also why the aforementioned definition of cyberbullying as the transmission and “upload” of harmful information via a use of digital technology ‘inflicting serious emotional distress’ in the social sphere is improper given the principle of legality (as used in New Zealand law).¹⁵⁵ Moreover, it is also possible to state that this definition resembles or is even almost identical to the criminal offense of public mischief that formerly existed in England and Israel and was later revoked since it did not accord with the principle of legality.¹⁵⁶

Moreover, the general definitions of cyberbullying laws mentioned above diminishes well established criminal requirements of *mens rea* (mental element necessary

KOMMENTAR ZUM STRAFGESETZBUCH, 2. AUFLAGE [VIENNA COMMENTARIES ON THE AUSTRIAN PENAL CODE], §107(c), ¶1 (2nd ed. 2016).

¹⁵⁵ Moreover, the suggestion offered by New Zealand's Minister of Justice, according to which crown (public) prosecutors are to exercise discretion and to only apply criminal law to the severest of cases hinders the principle of the separation of powers and the principle of legality. The constitutional principle of legality requires legislators to delineate the limits of the criminal proscription clearly. They must not assign this authority, which also constitutes one of their duties as legislators, to public prosecutors, since we are concerned with the rule of law rather than the rule of the public prosecution system. Moreover, there are no assurances to suggest that the public prosecution shall always act in a suitable and proper manner.

¹⁵⁶ See CA53/54, ASD v. Attorney General of Israel, CD VIII 785.

to convict any crime)¹⁵⁷ and *actus reus* (the prohibited behavior or conduct, including any specified consequences arising therefrom)¹⁵⁸ which also weakens the above mentioned principle of clarity. Most criminal offenses do not protect social values in an all-encompassing manner but rather protect them against specific behaviors, and it may certainly be argued that the number of offenses requiring a specific behavior as their *actus reus* is greater than the number of offenses that would settle for any act whatsoever. This therefore raises the question of the nature of the act or acts that fall within the scope of the general proscription of “cyberbullying” meant for protecting peoples’ reputation, privacy, freedom of action, and the integrity of body, property, life, etc. For comparison’s sake, it should be noted that the criminal proscription of defamation requires a behavior, i.e. “who publishes”; the criminal proscription of the violation of privacy defines multiple and specific forms of harms; the offense of intimidation requires a behavior, “who threatens;” the stalking offense requires a behaviour (harassment); an assault offense requires an act of striking, applying force and other forms of acts; the offense of grievous harm and the offense of reckless harm settle for any act capable of causing harm; while the killing offenses, including negligent homicide settle for any act capable of causing a person’s death.

The determination of the precise mental element or *mens rea*, is considered one of the most fundamentally important element in defining a criminal behavior.¹⁵⁹ Criminal law is meant for handling the most severe of behaviors, and a criminal offense is an anti-social phenomenon made up – among other things – of the offense’s *mens rea*. There could be many cases which call for a specific *mens rea* – such as intent – in order to aggravate the objective anti-sociality caused by the harm inflicted on the social value and thus define it as a criminal offense. This, in turn, raises the question of whether harms inflicted on all the social values falling under the general proscription of “cyberbullying” require the *mens rea* of a criminal mind, and – if so – whether a specific *mens rea* should also be required for the offense. We believe that the answer to this question is negative on both counts. Thus, for example, the offense of defamation is a behavioural offense under Israeli law, that requires a *mens rea* of “the intent to harm,” while the offense of a violation of privacy under Israeli law is also a behavioral offense, settles for awareness alone. The offense of intimidation under Israeli law, in turn, requires the intent to scare or taunt, while the assault offenses under Israeli law and the offense of grievous harm under Israeli law settle for the standard kind of criminal mind.

The determination of a precise *actus reus* is fundamental as well in criminal law, and alongside *mens rea* is considered a core element when defining a behavior to be criminal.¹⁶⁰ The teleological interpretative doctrine requires that all components of an offense be interpreted according to its purpose such that the existence of the offense’s *actus reus* should necessarily indicate the infliction of harm on the associated social value that is

¹⁵⁷ F. B. Sayre, *Mens rea*, 45 HARVERD L. R. 974-1026.

¹⁵⁸ JEREMY HORDER, *PRINCIPLES OF CRIMINAL LAW* 83 (6th ed. 2013).

¹⁵⁹ Sayre, *supra* note 157.

¹⁶⁰ HORDER, *supra* note 158.

to be protected. An interpretation that remains faithful to the purpose of the proscription it is meant to further, i.e. to the protected social value, might reduce the extent of a proscription when compared to the regular meaning of its wording, but does not suffice to justify a movement beyond the accepted meaning of the words of a given law with a view to an expansion of the proscription concerned. A general proscription against “cyberbullying,” which protects a wide range of social values, does not therefore provide the justice system with the guarantee of a proper interpretation of the proscription which would be faithful to the principle of being associated with and derived from a suitable social value.

Finally, there is the issue of the existing offenses’ applicability to harmful online behaviour. Consider Austria, for example, which has passed a dedicated single offense model to handle cyberbullying. However, the relation between the offense of cyberbullying as defined by §107(c) of the Austrian Penal Code and existing offenses present in the physical domain and addressed by Austrian law that also apply to the online domain, such as defamation, violation of privacy and intimidation, remains unclear. In other words, does §107(c) express an online offense such that anything not falling under a particular criminal proscription shall fall under the scope of the offense of cyberbullying, does the offense of cyberbullying according to §107(c) apply over and above particular offenses, or is the offense of cyberbullying a special offense which rejects the applicability of other particular offenses?¹⁶¹

Even though the rationale behind such a definition of cyberbullying among children as a dedicated offense is clear given the unique nature of the phenomenon as it applies to children and youth, given the characteristics of the technologies involved as discussed above and given the severe implications online violence exerts on children and youth in particular, the choice of this model also possesses more than a few disadvantages, as described above; the dedicated offense model, whether expressed by the legal, educational, or sociological systems as “cyberbullying,” “online violence,” or “electronic aggression,” etc. is not capable of defining the general criminal offense of online violence among children.

(b) “The Existing Offenses in Criminal Law” model

Alternatively, some legislatures chose to apply existing criminal offenses to combat cyberbullying. Violent online behaviors among children are primarily publications, i.e. expressions that may be capable of inflicting harm on or endangering a social value, and primarily humiliating and demeaning publications (defamation), violations of privacy, intimidations, harassments, incitements to violence, incitements to racial hatred, hurting religious sentiments, and inciting and aiding suicide.

¹⁶¹ See Leukauf & Steininger, StGB Strafgesetzbuch Kommentar [Commentaries on the Austrian Penal Code], §107(c), ¶13 (4th ed.).

German law adopts Existing Physical Domain Offenses Model and applies it to the online domain.¹⁶² The 2013 coalition agreement between the three ruling parties (the CDU, CSU, and SPD) states that “we shall improve the criminal protection against defamation on social networks and the Internet (cybermobbing and cybergrooming) since the implications of a defamation that faces the wider and unlimited public are destructive for the victim.”¹⁶³ The North Rhine-Westphalia (NRW) State’s ministers of emancipation and justice called for the formulation of a specialized cyberbullying offense.¹⁶⁴ The German Federal Parliament (Bundestag), in turn, carried out a reform of the German Criminal Code which explicitly stated that many offenses also apply to internet-based publications, such as social networks; furthermore, the Bundestag also passed an amendment to §201(a) of the German Criminal Code, entitled “Violation of the Personal Domain via Photographs” (*Verletzung des höchstpersönlichen Lebensreichs durch Bildhaufnahmen*), that criminalizes any photography or recording, as well as the conveyance of any image or recording without the victim’s agreement, regardless of whether the act of taking the photograph or making the recording was carried out lawfully in and of itself. After the passing of this amendment, the Federal Minister of Justice rejected the calls for the formulation of a dedicated and independent offense of cyberbullying and ruled that the aggravation of existing offenses constitutes a suitable response to this phenomenon.¹⁶⁵

Both the U.S. State of Missouri,¹⁶⁶ as well as the State of Massachusetts, amended existing physical domain offenses, such as the Harassment and Stalking offenses to also apply to cyberbullying.¹⁶⁷ As noted above, both New Zealand¹⁶⁸ and English¹⁶⁹ law apply existing physical domain offenses (defamation, violation of privacy, etc.) to

¹⁶² See Asbjørn Mathiesen, *Cybermobbing and Cybergrooming [Cybermobbing und Cybergrooming]*, JAHRBUCH DES KRIMINALWISSENSCHAFTLICHEN INSTITUTS DER LEIBNIZ UNIVERSITÄT HANNOVER 2014 (YEARBOOK OF THE CRIMINAL SCIENCE INSTITUTE OF THE LEIBNIZ UNIVERSITÄT HANNOVER) at 5-6, https://www.jura.uni-hannover.de/fileadmin/fakultaet/Institute/KI/Jahrbuecher/2014_-_Band_I_-_AM_-_Endfassung.pdf; Krause, *supra* note 11.

¹⁶³ Mathiesen, *supra* note 162.

¹⁶⁴ *North Rhine-Westphalia calls its own cyber-bullying paragraph in criminal law*, HEISE ONLINE (Aug. 22, 2016), <https://www.heise.de/newsticker/meldung/Nordrhein-Westfalen-fordert-eigenen-Cyber-Mobbing-Paragrafen-im-Strafrecht-3301858.html>.

¹⁶⁵ *Justice Minister Maas: Cyberbullying should not be ignored*, HEISE ONLINE (Jan. 18, 2016), <https://www.heise.de/newsticker/meldung/Justizminister-Maas-Cybermobbing-darf-nicht-ignoriert-werden-3073411.html>. It should be noted that these amendments refer to a perpetrator and victim who may be any person, including an adult, and that there is no particular treatment of the phenomenon of cyberbullying committed online by children and youth against children and youth.

¹⁶⁶ Missouri was one of the first states in the U.S. to have addressed the phenomenon of cyberbullying among children legally

¹⁶⁷ See Hinduja & Patchin, *supra* note 119.

¹⁶⁸ See *Id.*

¹⁶⁹ See *Id.*

cyberbullying over and above independent and dedicated legislation concerned with online violence.

The following are specific relevant physical domain offenses (using Israeli law as a reference for discussion of these offences) and a short discussion on how they apply to cyberbullying:

Harassment

An interesting and relevant offence which was amended in January 2014 to address cyberbullying is an amendment to the Prevention of Sexual Harassment Law, known as the “Video Law”.¹⁷⁰ This amendment stated that “the publication of an image, video, or recording of a person that focuses on said person’s sexuality” without the subject’s knowledge constitutes sexual harassment punishable by a maximum of five years’ imprisonment.¹⁷¹ Indeed, a statement made by Adv. Azriel of the Israel Ministry of Justice during an October 2015 meeting of the State Control Committee suggests that the Law is primarily meant to address youth online offensive behavior.¹⁷² The law was considered a trailblazer on a global scale, and attracted interest from such foreign parliaments as those of the United States, Italy, the United Kingdom, Sweden, and the UN Human Rights Committee.¹⁷³ Guidelines published by the State Attorney’s Office in February 2017 stated that “there is a genuine public interest in the enforcement of [the penalties for] violations of §§3(a) and 5(a) of the Prevention of Sexual Harassment Law [the Video Law] even when [we are] concerned with suspects who are minors with no criminal history. This is due to the serious harms inflicted by such violations and their far-reaching implications on the violations’ victims, as well as due to the need of also instilling said sections’ criminal proscriptions among children and youth.”¹⁷⁴ It is possible to observe an upwards trend in the enforcement of the penalties for this offense,¹⁷⁵ and the State Attorney’s Office has defined the phenomenon as a “national epidemic.”¹⁷⁶

¹⁷⁰ See the explanatory portion of the Prevention of Sexual Harassment Bill, 5773 AM – 2013, B516.

¹⁷¹ *Id.*

¹⁷² Protocol of the 33rd Meeting of the State Control Committee, The 20th Knesset (Oct 13, 2015) [Hereinafter State Control Committee Protocol No. 33].

¹⁷³ Arnon Ben Dror, *Awake -Wake up*, AT MAGAZINE 60 (July 15, 2014), <https://atmag.co.il/%D7%A1%D7%A7%D7%A1-%D7%95%D7%99%D7%97%D7%A1%D7%99%D7%9D/%D7%A2%D7%A8%D7%99%D7%9D-%D7%AA%D7%AA%D7%A2%D7%95%D7%A8%D7%A8%D7%95>.

¹⁷⁴ *Chakira Ve'Ha'amada Le'Din Be'Averot Shel Pirsum Tatslumim, Haklatot, o Sratim Shel Adam, Ba'aley Ofi Mini, Le'lo Haskamato* [Interrogation and arraignment on account of offenses pertaining to the non-consensual publication of sexually-tinted images, recordings, or videos of a person], HANCHAYOT PRAKLIT HA'MEDINA [STATE ATTORNEY’S GUIDELINES], <http://www.justice.gov.il/Publications/News/Documents/2.29.pdf>.

¹⁷⁵ State Control Committee Protocol No. 33, *supra* note 172, at 15.

¹⁷⁶ Israel State Attorney's Office, *Hanchaya Chadasha Shel Prakit Ha'Medina Bi'Dvar Mediniyut Ha'Chakira Ve'Ha'Ha'amada Le'Din Be'Avera 'Al Chok Ha'Sirtonim* [New State Attorney Guideline Concerning the Interrogation and Arraignment Policy for Offenses Pertaining to the

However, visionary ideation aside, many claim that the Video Law is not being enforced sufficiently.¹⁷⁷ Some attribute this to under-reporting since less than 2% of the actual number of cases involving severe online violence are reported in practice.¹⁷⁸ Indeed, very few bills of indictment have been submitted on account of the Video Law since it was passed. During the October 2015 Constitution, Law and Justice Committee meeting, Police Superintendent Gilad Bennett, Assistant Chief Counsel at the Ministry of Public Security's Cyber Operations Unit stated that a significant increase could be observed in the "Video Law"'s enforcement – while only 209 investigation cases were opened throughout 2014, 162 investigation cases had been opened during the first half of 2015 alone. However, at a later point during the very same meeting, Dr. Haim Wismonski, Head of the State Attorney Office's Legislation Division, claimed that only ten bills of indictment pertaining to violations of this Law were submitted on the basis of the aforementioned 162 investigation cases.¹⁷⁹

Defamation Offense

There is little doubt that the offenses of defamation apply to online domain publications.¹⁸⁰ For one thing, the definition of the term 'publication' is certainly wide enough to also encompass Internet-based publications.¹⁸¹ For another, the harm inflicted on a person's good reputation through the upload of publications to the Internet domain gives rise to significant and even severer harms than the harm in the physical domain.¹⁸² Moreover this harm is of continuous nature because of the extent of the exposure

'Video Law'], (Feb 06, 2017),

<http://www.justice.gov.il/Units/StateAttorney/Publications/OnTheAgenda/Pages/19-02-17.aspx>.

¹⁷⁷ Protocol of the 45th Meeting of the Constitution, Law, and Justice Committee, *Hafatsat Techanim Ve'Sirtonim Mashpilim Ba'Mirshetet [Distribution of Humiliating Content and Videos on the Internet]*, THE 20TH KNESSET (Oct 13, 2015) [Hereinafter: Constitution, Law, and Justice Committee Protocol No. 45]. See also Protocol of the 18th Meeting of the Science and Technology Committee, *Gevulot Ha'Siach Ba'Merchav Ha'Interneti – Hitabdut Be'Iknot Post Ba'Facebook [The Limits of Discourse within the Internet Domain – A Case of Suicide Following a Facebook Post]*, THE 20TH KNESSET (Oct 13, 2015) [Hereinafter: Science and Technology Committee Protocol No. 18].

¹⁷⁸ See Nagar, *Seker Be'Nose Peshi'a/Biryotut Ba'Reshet [Survey on Online Criminality/Cyberbullying]*, ISRAEL MINISTRY OF PUBLIC SECURITY RESEARCH DEPARTMENT (Jan. 2015).

¹⁷⁹ Constitution, Law and Justice Committee Protocol no. 45, *supra* note 177, at 8, 14.

¹⁸⁰ See AAP 850/06, *Mor v. Yediot Internet 19* (2007) (Isr.); CAA 4447-07, *Rami Mor v. Barak ITC The International Telecommunication Services Company Ltd.*, LXIII(3), 664 (1995) (Isr.); FC (RSHLTZ) 17772-01-10, *Anonymous Man v. Anonymous Woman* (2013) (Isr.); FC (BS) 21757-10-11, *Anonymous Woman v. Anonymous Man* (2013) (Isr.); ECC Safed 54888-01-12, *Meir Vaknin v. Motti Mu'alem* (2012) (Isr.); TA 47032/04-14 (*Krayot Magistrate's Court*); *Strogano v. Peled* (2015) (Isr.).

¹⁸¹ See Israeli defamation law as an example. *Prevention of Defamation Law*, BL 240, §1, 6, 7, (5725 AM – 1965) (Isr.).

¹⁸² See also Israeli case law: "harm inflicted on a person's good reputation through the upload of publications to the Internet domain gives rise to significant and even severer harms in the future given the extent of the exposure and its length... these damages... are continuous and significant

and its length.¹⁸³ However, it should be noted that while 27% of children and youth are exposed to online violence,¹⁸⁴ which includes defamation, criminal defamation law is very lightly enforced and only one criminal defamation case involving children was opened in 2014.¹⁸⁵

The Violation of Privacy Offense

Existing law protects privacy against being violated in the online domain, and courts have recently begun to identify the immense damage inherent in the harms inflicted in and distributed through social networks – damage which is even more severe than the damage associated with harms inflicted on privacy “in the old world.”¹⁸⁶ Data received from the Israel Police Force reveals that 112 cases pertaining to privacy violations among minors were opened in 2014 (72 of which concerned the publication of a humiliating image).¹⁸⁷ This datum is particularly interesting when the data is compared to its 2011 equivalent, when 30 cases pertaining to privacy violations among minors were opened (7 of which concerned the publication of a humiliating images). The considerable increase in the opening of privacy violation cases indicates a greater enforcement of the law, and it is thus possible to assume that it does indeed protect against privacy violations in the online domain.

The Intimidation Offense

damages given the nature of our present technological world, and given the “eternality” of the information uploaded to the Internet.” CRC (PT) 33837-09-13, *The State of Israel v. Yossef Yitzchak Cohen*, para 16, 24 (2015) (Isr.).

¹⁸³ *Id.*

¹⁸⁴ See TALI HEIMAN ET AL., *supra* note 41, at 32.

¹⁸⁵ Based on data obtained on February 9, 2015 from Police Sergeant Major Gila Kalderon, Coordinator of the Israel Police Force’s Freedom of Information Unit and Public Complaints Unit, as a result of a Freedom of Information request. Moreover, during the October 2015 Knesset Science and Technology Committee meeting on “The Elimination of the Violent and Bullying Discourse in the Virtual Domain and on Social Networks” Police Commander Meir Chayun, then head of the Israel Police Force’s Cyber Operations Unit and currently the Commanding Officer of the Israel Police Force’s Anti-Violence and Online Criminality Apparatus, stated that “as far as the cyber bullying issue is concerned [...] I’m not sure whether we would like the Israel Police Force present in our children’s schoolyards [...] even [if] being socially excluded on WhatsApp is a very serious thing [...] it’s something that remains for a very long time. The Internet doesn’t forget these things. I’m not sure whether we want the Israel Police Force in this arena.” Science and Technology Committee Protocol No. 18, *supra* note 177, at 17. This statement clearly reveals the very meager extent to which defamation law is being enforced among children in the online domain.

¹⁸⁶ See CRC (PT) 33837-09-13, *S.I. v. Cohen* (2015) (Isr.); CAA 1728/17, *Anonymous Person v. S.I.* (2017) (Isr.); YAC 8878-08-16, *S.I. v. A Minor*, 1 (2017) (Isr.).

¹⁸⁷ The data was received on February 9, 2015 from Police Sergeant Major Gila Kalderon, Coordinator of the Israel Police Force’s Freedom of Information Unit and Public Complaints Unit, as a result of a Freedom of Information request.

In this case, we are concerned with an act carried out in any fashion with a view to causing a person to fear harm to her or his body, liberty, property, good reputation or her or his livelihood or that of another person.¹⁸⁸ Violations of this offense are enforced in the online domain,¹⁸⁹ but there has not been too much of a difference in the amount of criminal cases opened for minors on account of the offense of intimidation (3,204 such cases were opened in 2010 compared to 3,576 in 2014, of which 47 were opened on account of intimidations on a social network).¹⁹⁰ In other words, it may be argued that this offense provides a certain degree of protection against online intimidation.

1. Criticism of Applying the Existing Offenses in Criminal Law Model

The relevant physical domain offenses that apply to cyberbullying are thus primarily defamation, the violation of privacy, intimidation, and sexual harassment. However, their actual suitability for handling the phenomenon of online violence among children and youth appears to be limited for several reasons as we shall later elaborate. Their suitability is also limited due to the fact that they do not take the characteristics of the relevant technologies into consideration as well as the characteristics of children and youth's online behavior.¹⁹¹

The application of existing law to online violence as it stands presents enforcement challenges that arise from a number of reasons: Firstly, children and youth tend to refrain from sharing or reporting cases of cyberbullying to their parents, to educational staff,¹⁹²

¹⁸⁸ Israeli Penal Law 5737 AM - 1977, BL 226, §192 (Isr.).

¹⁸⁹ CRC (TA) 4833/99, *The State of Israel v. Isaac Doron* (2002) (Isr.). In this case, the Court ruled that "there is little doubt that any person as a person is entitled to such rest and peace of mind in her or his home and in her or his daily life that must not be disrupted by the pugnacity, belligerence, aggressiveness or whims of others. He or she is entitled to not being interrupted or harassed by intimidating speech or messages or by harassing telephone calls and/or emails." It is important to note that "harassment" pertaining to the use of a telecommunications device includes electronic messages (an encoded telecommunication message conveyed through the Internet to an addressee or a group of addressees which is capable of being saved and retrieved in a computerized fashion) - *see* The Communications Law (Telecommunications and Broadcasting), 5742 AM - 1982, BL 218, §30(a) (Isr.).

¹⁹⁰ Based on data obtained on 9.2.2015 from Police Sergeant Major Gila Kalderon, Coordinator of the Israel Police Force's Freedom of Information Unit and Public Complaints Unit, as a result of a Freedom of Information request.

¹⁹¹ Factually, only a very small number of criminal cases pertaining to these offenses and associated with violent social network conduct were opened in 2014: 47 intimidation cases, 5 cases involving sexual harassment by way of publishing a photo or recording, 1 defamation case, and 11 cases involving the violation of privacy. A total of 64 cases pertaining to violent and harmful social network conduct by children were opened in 2014. This datum clearly does not reflect the extent of the phenomenon and we are thus concerned with minute enforcement percentages. Based on data obtained on February 9, 2015 from Police Sergeant Major Gila Kalderon, Coordinator of the Israel Police Force's Freedom of Information Unit and Public Complaints Unit, as a result of a Freedom of Information request.

¹⁹² *See* further details in, *supra* notes 110-116.

and certainly to law enforcement authorities.¹⁹³ Secondly, it is difficult to convict children and youth of existing criminal offenses based on criminal law that requires a *mens rea*¹⁹⁴ especially considering that most children commit acts of cyberbullying as a result of boredom, by virtue of the very fact of belonging to a group,¹⁹⁵ in jest, and rarely as a result of malice or a criminal mind.¹⁹⁶ Finally, many acts considered cyberbullying, especially in light of the many definitions we have listed above,¹⁹⁷ do not always satisfy the elements of the offense in the legal senses accepted in the physical domain, which is why some find it difficult to perceive violent online behaviours as criminal offenses.¹⁹⁸

¹⁹³ See Daniel M. Steward & Eric J. Fritsch, *School and Law Enforcement Efforts to Combat Cyberbullying*, 55 PREVENTING SCH. FAILURE 79, 84 (2011). Under-reporting rates are similar in Israel, and only about 2% of online violence cases are reported to law enforcement authorities. See *supra* note 249.

¹⁹⁴ See discussion of *mens rea* above.

¹⁹⁵ See *supra* note 97.

¹⁹⁶ Susan W. Brenner & Megan Rehberg, 'Kiddie Crime?' *The Utility of Criminal Law in Controlling Cyberbullying*, 8 FIRST AMEND. L. REV. 1, 29, 78-80 (2009). Consider, for example, the 2008 case of 18-year-old Phillip Alpert from the State of Florida in the United States, who sent nude pictures of his 16-year-old ex-girlfriend to dozens of acquaintances via email. Alpert was subsequently convicted on 72 criminal counts, including – among other things – the possession and distribution of child pornography. Among other measures, this conviction also entailed Alpert's registration as a sex offender, a record that would be valid and bear implications for Alpert until he is 43 years old. See Vicki Mabrey & David Perozzi, "Sexting: Should Child Pornography Laws Apply? ABC NEWS (1/4/2010), <http://abcnews.go.com/Nightline/philip-alpert-sexting-teen-child-porn/story?id=10252790>. For the implications of the "sex offender" labelling. See Christopher Valen Blog, *Law of Unintended Consequences*, CHRISTOPHER VALEN BLOG, <http://christophervalen.com/blog/?tag=philip-alpert>. His attorney argued that Alpert's case represented a miscarriage of justice and that such indictments – which ignore the actual facts of the case – associate children destructively with a group of hardened criminals: rapists, pedophiles, and sex offenders. The attorney further argued that Alpert would not have left his house, gone to the post office in person and mailed nude pictures of his ex-girlfriend to seventy people. In this respect, it was technology that enabled this kind of mass distribution. Alpert himself testified that his conduct was driven by a sense of revenge in the middle of the night and that he even forgot what he had done the next morning. See Mabrey & Perozzi, *supra* note 196. If Austrian law was to be applied to Alpert's case it is safe to state that Alpert would have been convicted for a single offense rather than 72 separate offenses. German and Canadian law too would have only convicted Alpert for a single offense rather than 72 offenses. Physical domain offenses should thus also be applied to online violence but with certain modifications.

¹⁹⁷ See *supra* notes 18-23.

¹⁹⁸ See, for example, the case of *Elonis*, in which the US Supreme Court deliberated whether the publication of a status on the Facebook social network could be considered a threat. The case was concerned with a person who published a status on his Facebook page where he asked whether a folded restraining order placed in a front pocket is thick enough to stop a bullet. This status was aimed to threaten his ex-wife. The U.S. Supreme Court ruled that social network publications are protected by the freedom of expression and do not constitute an offense of intimidation. The court further ruled that negligence does not suffice for an expression to be considered threatening, and

It is the technology itself – which facilitates the mass transmission of pictures at the push of a button – that must also be taken into account and represented in the legal arena with respect to both legislation as well as enforcement. In our opinion, the use of physical domain definitions thus proceeds from the assumption that behaviors in the physical and virtual domains are similar or comparable – an assumption which ignores the unique influence of technology.¹⁹⁹ A new point of view is therefore required if we are to bring about a re-evaluation of the components, substance, and severity of online violence.

An additional problematic aspect of applying existing criminal offenses to online violence becomes apparent in cases where such online violence leads to the victim's suicide. Consider, for example, the United States case in which a 17-year-old girl encouraged an 18-year-old young adult to commit suicide via hundreds of digital messages. Whenever the young adult hesitated or expressed concern for his family, she tried to pacify him: "they will continue their lives for your sake because they know that it is what you would have liked," she wrote.²⁰⁰ "They know that you would not want them to be sad and depressed and angry and guilt-ridden. They know that you would want them to live their lives happily. So they would do it for you. You are right. You need to stop thinking about it and just do it."²⁰¹ Although some similar cases end up differently,²⁰² a Massachusetts jury

that subjective intent must also be present for this to be true. *See* *Elonis v. United States* 575 U.S. 7 (2015), http://www.supremecourt.gov/opinions/14pdf/13-983_7l48.pdf. The decision's critics argue that the Court's ruling was too narrow and that the majority opinion avoided discussing issues pertaining to deep constitutional questions such as the freedom of expression within the Internet domain as a whole and the social network domain in particular. Prior to this decision's publication, there were many in the United States who hoped that it would institute new rules that would be relevant to the freedom of expression in the current era: "Modern media allow personal reflections intended for a small audience (or no audience) to be viewed widely by people who are unfamiliar with the context in which the statements were made and thus who may interpret the statements much differently than the speakers intended." *Elonis v. United States* 575 U.S. 7 (2015), *petition for cert. filed*, 34, <http://sblog.s3.amazonaws.com/wp-content/uploads/2014/04/13-983-Elonis-petition-final-2-13-14-no-appendix.pdf>. For post-decision critiques. *See*, Ariane de Vogue, *SCOTUS rules in Favor of Man Convicted of Posting Threatening Messages on Facebook*, CNN POLITICS (June 6, 2015), <http://edition.cnn.com/2015/06/01/politics/supreme-court-elonis-facebook-ruling/>.

¹⁹⁹ See discussion *supra* notes 83-88.

²⁰⁰ See Marin Cogan, *Death by Text Message: Can a Girl Who Encouraged her Boyfriend to Commit Suicide be Charged with Murder? A Girl Sent her Depressive Boyfriend Hundreds of Texts Encouraging Him to Kill Himself. Does This Make Her a Murderer?*, THE CUT (Apr. 27, 2016), <https://www.thecut.com/2016/02/conrad-roy-michelle-carter-c-v-r.html>. It should also be noted that the minor's attorney argued that text messages are protected by the freedom of expression. *See also* Abby Phillip, *'It's now or never': Texts Reveal Teen's Efforts to Pressure Boyfriend into Suicide*, THE WASHINGTON POST (Aug. 31, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/08/31/its-now-or-never-texts-reveal-teens-efforts-to-pressure-boyfriend-into-suicide>.

²⁰¹ *Id.*

²⁰² Consider, for example, the case of Megan Meier's suicide. In 2008, a 49-year-old female resident of the State of Missouri, Lori Drew, fraudulently presented herself as a 16-year-old boy and pursued a virtual romance with her neighbor, a 13-year-old girl, with the intent of exacting

decided to take the case to trial in February 2015, and the minor was subsequently indicted for negligent homicide. The jury found “sufficient evidence suggesting that the minor caused the boy’s death by recklessly and negligently assisting him to kill himself by monoxide poisoning.”²⁰³

Our position in this respect is that the problem of the offense’s *actus reus*²⁰⁴ can be overcome in causation offenses that do not require a specific behaviour, but that it is very difficult and even impossible to ascribe the eventual result to the publisher of the harmful content. It might be possible to apply the doctrine of legal causation in the sense of ‘reasonable foreseeability,’ i.e. a reasonable person’s reasonable foresight of the process of the result’s causation. However, the eventual result may not be ascribed to others when we are concerned with an autonomous action carried out by the victim her or himself.²⁰⁵

C. Dealing with a Unique Population

Insofar as the phenomenon of online violence by children and youth is concerned, some argue that the same physical domain penal proscriptions that apply to adults should also be applied to children and youth, with a caveat – a reduction of anti-sociality as well as a reduction of guilt – being considered as a mitigating consideration in the process of penalization applicable to all penal proscriptions.²⁰⁶ We beg to differ.

In our opinion, the datum “children” and “youth” which expresses a reduction in the act’s anti-sociality and a reduction of guilt does not solely express a mitigating consideration in penalization but also affects the very definition of the phenomenon as criminal. Indeed, we are concerned with the very fact of criminalization and not solely with the considerations involved in penalization. It should also be stated that while the acts of

revenge on her on account of a falling out between Megan Meier (the neighbor girl)’s and Lori Drew’s daughter. At the end of this romance, Drew broke up with the girl, using – among other things – harsh language suggesting that “the world would be a better place without her.” This utterance led to the girl’s suicide 20 minutes later. In this case, the Court convicted the harming party of three misdemeanor counts of unauthorized access to an Internet site, which is penalized minimally (in this case by the imposition of monetary fines). See *United States v. Lori Drew*, 259 F.R.D. 449 (C.D. Cal. 2009). This issue was dealt with by Austrian law (§107(c)(2) of the Austrian Penal Code), which defines an online publication leading to a victim’s suicide explicitly as an offense of aggravated cyberbullying, i.e. the offense is meant to protect liberty rather than human life and is punishable by a maximum of three years’ imprisonment. In other words, we are concerned with a specialized proscription which differs from that associated with killing offenses.

²⁰³ Cogan, *supra* note 200.

²⁰⁴ See *Id.*

²⁰⁵ See FDC 404/13, *Anonymous Person v. The State of Israel (Isr.)*; furthermore, see also Kremnitzer, *Mischak Mesukan Ke'Eyru'a 'Avaryani – He'arot La'He'arot (Teguva)* [A Dangerous Game as a Transgressive Event – Comments on Comments (Response)], *Mishpatim [Laws]*, XXVI 619.

²⁰⁶ For the rationales underpinning the divergent and lenient penalization of children, see CA 5048/09, *Anonymous Person v. The State of Israel* (2010) (Isr.); *In re Gault*, 387 U.S. 1, 16 (1967).

causing the death of a person, causing grievous harm, assaulting a person etc., cause a protected social value to be harmed in the physical sense regardless of whether the perpetrator is a child a young adult or an adult (since the objective result in either case still represent a harm inflicted on the protected social value), different rules apply when we are concerned with acts that represent online domain publications – for several reasons:

First, many utterances produced by children and youth in the online domain would not have been treated with the same degree of seriousness had they been uttered by adults; this is because an adult is well aware of her/his actions and of its consequences and usually considers the ramifications of her/his actions carefully, while children employ vulgar language, do not consider the nature and ramifications of their utterances carefully, and experience the harassment of another person as a kind of entertainment without understanding its implications and its severe ramifications.²⁰⁷

This position has also been manifested in American case law. A New York Court, for example, deliberated a case in which five young girls published demeaning expressions concerning one of their female classmates, including – among other things – that this classmate was suffering from several contagious sexually transmitted diseases, and that she engaged in sexual intercourse with a horse, a baboon, and a male prostitute.²⁰⁸ In this case, the Court ruled that these allegations were not denigrating and that no defamation took place, due, among other things, to the fact that the case concerned vulgar humor, hyperbole and schoolgirl attempts at one-upmanship.²⁰⁹

Furthermore, children and youth tend to get into quarrels quickly and, conversely, to make up quickly too. This position is also manifested in Austrian law, which notes that disputes and fallings-out between children are quick to form and quick to disperse, since their ramifications are few and often even negligible, which is why criminalization requires recurrent acts, i.e. a single publication is insufficient for criminalization.²¹⁰

²⁰⁷ See Mabrey, *supra* note 196.

²⁰⁸ See Finkel v. Dauber, 906 N.Y.S.2d 697, Sup. Ct. Nassau Cnty. (2010).

²⁰⁹ In another case, a 14-year-old girl from the State of Georgia filed a libel suit against two of her female classmates. The defendants established a fake and falsified Facebook page under the plaintiff's name, in which they wrote that she smoked marijuana and in which they published twisted pictures of her. 70 Facebook friends, including some of the victim's friends and family members had access to this page. See John Vinson, *Georgia Teen, Alex Boston, Sues Classmates Over Fake Facebook Account*, WEBPRONews (May 1, 2012), <https://www.webpronews.com/georgia-teen-sues-classmates-over-fake-facebook-account/>. In May 2011, the victim's family contacted the school's principal, and both classmates were suspended for two days after admitting their guilt. See Boston v. Athearn, 764 S.E.2d 582 (Ga. Ct. App. 2014). This case gave rise to a public debate on the suitability of physical domain law to online violence among children. Julie Hilden, *Is a Defamation Case a Good Remedy for Cyberbullying? An Atlanta Girl Tests the Law*, VERDICT (June 11, 2012), <https://verdict.justia.com/2012/06/11/is-a-defamation-case-a-good-remedy-for-cyberbullying>.

²¹⁰ *Id.*

Moreover, and while it is formally true that the *mens rea* of a criminal mind is made up of a knowledge component and occasionally from a voluntary component too, and may exist among children and youth,²¹¹ it is clear that the kind of *mens rea* that forms among this population expresses a less severe and less powerful assault on the socio-legal order than the same *mens rea* of a criminal mind that forms among adults. Thus, the perpetrator being a child or a young adult there is an inherent reduction of the act's anti-sociality and a reduction of its perpetrator's guilt. Penal Law handles especially severe phenomena while less severe phenomena are handled by administrative law and by civil law. The bulk of online domain publications made by children against other children falls under the scope of defamation, violations of privacy, and harassments. Insofar as their severity is concerned, these are phenomena that are located at the lowest tier of the domain of criminal offences.

This position is manifested in Austrian law, which states that an online publication is only proscribed in the case of continuous harm; an extra aggravation of anti-sociality is necessary for the publication's criminalization. Furthermore, the maximum penalties for the cyberbullying offense are two years' imprisonment under New Zealand law, one year's imprisonment under Austrian law and six months' imprisonment under English law. It is possible to state that the imprisonment penalty would be applied to particularly severe publications, while very lenient penalties, and possibly a sanction without conviction (Probation), may be applied to mild or intermediately severe publications. Indeed, the effectiveness of criminal law is doubtful or – at best - very limited in the case of less severe publications. Even the New Zealand Minister of Justice (Amy Adams) had stated that physical domain offenses should only be applied to cyberbullying among children in cases of severe violence.²¹² Administrative measures, such as the removal of children from schools and other sanctions should also be developed in a manner akin to the French and American (State of Massachusetts) positions on this issue. Moreover, the application of criminal law can, in some cases, exert a destructive influence on children – both the victim whose way of life shall be harmed as well as the perpetrator who would have to face criminal proceedings. It follows that there could be many cases in which an adult's online act satisfies the elements of an offense while the same online act committed by a child should not fall under the scope of the offense.

The proper conclusion that should be drawn, in our opinion, is that the handling of cyberbullying among children through a dedicated single criminal proscription or by way of the applying existing criminal offences present in the physical domain as they stand does not express the kind of justice that should be applied in order to address this phenomenon efficiently. We believe that the adaptation of existing offenses by the addition of “aggravating categories”, that recognize the population involved and the technological characteristics will lead to an offense that would be enforceable in an efficacious and

²¹¹ *Id.*

²¹² See Amy Adams Defends anti cyber-bullying bill as critics say free speech will be criminalized, *supra* note 115.

uniform manner, that would reflect the true understanding of the phenomenon, and that would contribute to a more effective enforcement.

D. A Desired Definition of Online Violence Among Young Adults: The “Aggravating Categories” Model

This starting point and our focus on the potential harm inherent in violent online behavior led us to the formulation of three “aggravating categories” which take the characteristics of the technologies concerned and the characteristics of child and young adult behavior into account: sexuality, violence, and intensity, and whose very existence as classifiers of these violent behaviors by severity may be said to aggravate the phenomenon’s anti-sociality and guilt:

- **Degree of Sexuality:** It is first necessary to ask whether we are concerned with a violent communication with a prominent sexual dimension, i.e. we need to concern ourselves with the violent discourse’s degree of sexuality (viz. verbal sexual messages and nude images should not be treated in the same way as non-sexual disparaging messages and photographic taunts).²¹³
- **Degree of Intensity:** Another important factor which should be examined is the harmful communication’s degree of intensity. The number of harmful messages should thus be examined, as well as the number of participants involved in their distribution,²¹⁴ the communication’s degree of recurrence,²¹⁵ and the extent and term of its accessibility (i.e. whether it was accessible to a large number of people for a long period of time).
- **Degree of Violence:** The last aggravating category that justifies criminalization is the discourse’s degree of violence. To this end, it is necessary to examine whether we are concerned with an actual threat to the victim and to which extent. In addition, we must also examine the degree of detail present in the level of violence: the

²¹³ A reinforcement of this position may be found in the Video Law, where Israeli and German legislators chose to address sexually-tinted online violence in a dedicated and focused fashion through the amendment of the Prevention of Sexual Harassment Law. However, the Video Law only addresses the sexual facet of violent online behavior and leaves other violent online behaviors to be handled by general physical domain proscriptions or to remain unaddressed and within the scope of “tolerable children behavior,” creating a reality of cyberbullying that includes “normal children” behavior that does not require any intervention by enforcement authorities as well as violent and sexually-tinted violent behaviors that merit criminalization and enforcement.

²¹⁴ For the distinction between the active participant who had created the violent online content and the passive participant who passes the publication along to other people, also see Science and Technology Committee Protocol No. 18, *supra* note 177, at 14.

²¹⁵ It will be necessary to examine each case separately. In some cases, the intensity metric would be satisfied when the distribution of a harmful message is carried out repeatedly, and in others when this distribution was made once but to a group with a large number of members.

more detailed and violent the harmful communication, the greater the tendency toward its criminalization. On the other hand, a communication that only gives rise to a suspicion of harm may not or - at the very least – should not be criminalized.²¹⁶

Our proposal is that only incidents of cyberbullying that satisfy at least one of these criteria might be suitably handled by criminal law.²¹⁷ Any aggravating category is a factor that might increase the harm's severity. Sexually-tinted online communication, communications that are intensively recurrent, or communications that are particularly violent are communications that might inflict a great deal of harm on the victim. Other incidents of cyberbullying— those that do not satisfy these criteria - represent “soft violence” or “kiddie crime”²¹⁸ that need to be addressed and responded to outside the boundaries of criminal law.

E. Possible Critiques of the “Aggravating Categories” Model

A possible argument that can be made against the aggravating categories is that they are nebulous safety-valve concepts (*Ventilbegriffe*) that require a great deal of interpretative consideration by all parties involved, such as the enforcement authorities and the juridical system. They thus may be seen as suffering from the same un-clarity present in the single dedicated offense model. However, we are of the opinion that these concepts are relatively clear and lucid. The concept of ‘sexuality’ exists in the Israeli Video Law, for example, and may be consulted in this respect. The concept of ‘intensity’ refers to the number of acts committed by a single perpetrator or by all group members. In this respect, it is possible to consult the Austrian model, which requires a correlation between the act's severity and a time period: 3 severe acts in the course of a one-month period or 10 non-severe acts in the course of a number of weeks satisfy this requirement. The concept of “violence” also satisfies the clarity requirements since the legal system has already defined both physical and verbal violence. The three aggravating categories thus largely address the unique characteristics of the relevant technologies we presented in the first section, and are classifications which allow us to infer and derive behavioral severity and to determine whether legal interventions and all that they entail are actually necessary.

²¹⁶ Akin to the discussion of the offense of incitement to violence as a suspicion and risk offense. See Mordechai Kremnitzer & Khalid Ghanayim, Hasata, Lo Hamrada [**Incitement, not Seditio**] 41 (position paper 7, Jerusalem 1996).

²¹⁷ We argue that we must have an enforceable criminal tool that would act as a deterrent to children with respect to the commission of cyberbullying despite the high rates of recidivism among convicted and imprisoned young adults in Israel (75%) (see Ido Avgar, *Shikum Asirim Ketinim* [*Rehabilitation of Juvenile Prisoners*], KNESSET RESEARCH AND INFORMATION CENTER, 3-5 (2016), <https://www.knesset.gov.il/mmm/data/pdf/m03884.pdf>). This is primarily because the phenomenon of online violence is so widespread, and because we believe that a proper education and a focus on the delimitation of proscribed behaviors would lead to a reduction in the phenomenon's prevalence on the one hand and to a reduction in recidivism on the other hand.

²¹⁸ For these concepts and the manner in which they relate to cyberbullying among children and to criminal law, see also Brenner, *supra* note 196 at 78-80.

With this in mind, we believe that the chosen categories will provide a genuine reflection of cyberbullying incidents that are severe enough as to merit criminalization against the background of a digital world in which harms are measured by the extent of damage exerted by a violent and harmful message. Furthermore, and in this respect, the extent of the harmful message's exposure, its violent nature or its sexual content would indicate the severity of the damage it exerts and the extent of the harm inflicted on the victim. In other words, we believe that these categories would assist enforcement authorities and courts in analyzing whether the behaviors they are asked to consider justify criminalization and criminal labeling or – rather – call for some form of extra-legal treatment.

Moreover, these principles may also give rise to an increase in the reporting of cases of cyberbullying at all levels pertaining to the parties that may be involved, from the harmed child, through her or his parents or teachers, toward schools, and enforcement agencies, that will then be able to distinguish between cyberbullying behaviors that could be handled within the school via educational methods and disciplinary measures and behaviors that merit the intervention of external parties. Indeed, the categories we have chosen address a need that arose from the schools themselves with respect to guidance on the identification of cases of severe online violence, and allow for a distinction between violent behaviors that do not merit legal treatment and violent behaviors that must be reported and passed on to law enforcement authorities.²¹⁹ In addition, these categories will also give rise to a reduction in enforcement problems since they would provide a frame of reference that would indicate an act's severity and that would distinguish between 'regular' bullying behaviors that should be associated with 'schoolyard behavior'²²⁰ and bullying behaviors that must be unequivocally addressed by enforcement authorities.

All in all, therefore, these categories would not only constitute a legal framework for the definition of criminal cyberbullying behavior, but would also constitute a milestone in the definition and delimitation of children behaviors for all the parties involved in their lives, and would thus contribute toward the formulation of a holistic response to cyberbullying, which must address the concerns of parents, educators and the children themselves with respect to the delimitation and identification of severe violent behaviors that merit and justify handling by law enforcement authorities. Finally, we believe that concentrating on these categories – that focus on possible potential damage – would also aid in the formulation of an educational framework in which children themselves would

²¹⁹ A certain degree of confusion and uncertainty exists with respect to the role played by schools insofar as online dangerousness is concerned as well as the role of teachers – and the limits of their authority – with respect to what their students experience online. See Wanda Cassidy & Chantal Faucher & Margaret Jackson, *Cyberbullying among youth: A comprehensive review of current international research and its implications and application to policy and practice*, 34(6) SCH. PSYCHOL. INT'L, 575-612 (2013).

²²⁰ See the protocol referenced in *supra* note 185, where Police Commander Meir Chayun shares the difficulty present in identifying cases of online violence that merit interventions by enforcement authorities.

learn how to identify criminally violent behavior and would be able to recognize whether they or their peers experiences a criminal offence. Such an educational framework, in turn, would act as a preventive factor that would contribute toward the reduction of the phenomenon of cyberbullying among children.

Conclusion

The centrality of technology in our lives in general and in our children's lives in particular means that we must concern ourselves with the formulation of suitable solutions – both legal and otherwise - to the issue of cyberbullying. Cyberbullying is a social-communal phenomenon, which requires a joint effort by all relevant parties in the education, law enforcement, and legal systems if we are to eliminate it. Moreover, any such elimination will need to address prevention and not be solely concerned with *post factum* interventions that are to be applied after harms have already been inflicted. In this respect, we believe that placing a focus on the phenomenon's characteristics, the characteristics of the digital domain, and on the characteristics of child and youth behavior within the digital domain in general and social networks in particular will lead to a raising of awareness and to the possibility of effective and uniform interventions in cases of severe cyberbullying.

Indeed, just about every child is currently in possession of a cellphone with a camera and data package which allows them to upload pictures to social networks at a push of a button, an act with an immense potential for harm. This harmful message may be viewed, downloaded, shared and saved anywhere in the world. This potential of damage give rise to a new reality in which a very severe danger is inherent in these harmful acts alongside a simultaneous and greatly reduced guilt on the perpetrator's part. This new reality calls for an in-depth examination of relevant legal frameworks for the prevention of miscarriages of justice as well as cases of perpetrator over-criminalization.²²¹

A definition and delimitation of proscribed behaviors that would focus on categories that reflect the potential damage of a harmful message within the digital domain will lead to an increase in the reporting of severe cases of cyberbullying and will thus contribute toward effective enforcement of related law. Put differently, these categories would allow parents, educational frameworks and enforcements authorities to join forces and employ a uniform definition in the service of eliminating the phenomenon of online violence.²²²

²²¹ See also Almog, *supra* note 83 at 15-18.; NIVA ELKIN-KOREN & MICHAEL BIRNHACK, RESHET MISHPATIT: MISHPAT VE'TECHNOLOGIYOT MEYDA' [LEGAL NETWORK: THE LAW AND INFORMATION TECHNOLOGIES] 14 (2011); MICHAEL BIRNHACK, MERCHAV PERATI: HA'ZECHUT LE'PERATIYUT [PRIVATE SPACE: THE RIGHT TO PRIVACY] 50-55 (2010).

²²² Consider, for example, the statement made by Police Commander Meir Chayun, Head of the Israel Police Force's Cyber Unit, during the aforementioned meeting of the Knesset Science and Technology Committee, where he referred to the phenomenon of online violence as "cyberbullying" and described it as a phenomenon that does not cross the threshold of criminality. See Science and Technology Committee Protocol No. 18, *supra* note 177, at 16-17.

As can be seen above, our initial focus in the present article was placed on cyberbullying phenomenon's uniqueness among children, on the link between children and social networks, and on technological characteristics which permit the maltreatment of other children in such a manner as to justify the re-examination of the law as it stands. We then analyzed two models applied in other countries with the goal of handling the phenomenon of cyberbullying among children: a model that establishes a single dedicated cyberbullying offense, and a model that applies existing physical domain offenses to the online domain. Our analysis showed that both models are lacking. The first model should not be adopted as-is on account of the generality of the offense in question (which harms the principle of legal certainty in criminal law and makes it difficult to identify the various social interests that are harmed by the offensive behavior in question). The second model also suffers from faults since it does not address the uniqueness of the digital domain and low reporting percentage and few criminal charges that were served against children demonstrate this model weakness and irrelevancy. Put differently, both models are not adequate in handling the phenomenon of cyberbullying since they fail in addressing the problem of among children in an effective manner.

With this in mind, we then turned to offering a desired model for the handling of cyberbullying, given that it adapts existing law to this end without failing to consider the child and young adult perpetrators' unique characteristics as well as the unique characteristics of the technologies involved, viz. the public nature of online content, widespread distribution for an indefinite period of time, the difficulties involved in supervising online behavior, etc.

As noted above, our proposed model focuses on three "aggravating categories": the degree of sexuality, the degree of violence, and the degree of intensity, where the presence of even one among the three is sufficient for the proscribed behavior's criminalization. Over and above their other advantages, these categories can also be seen as facilitating the process of distinguishing between behaviors that – while morally flawed – should not be

At a later point in the meeting, Chayun argued that "the Video Law is a superb and excellent law which, in my opinion, provided a very good response to the phenomenon that we shall call 'bullying' and which the Knesset has decided has crossed the threshold of criminality." *Id.* at 18. This transition between the definition of violent online behaviors as cyberbullying – a phenomenon that does not cross the threshold of criminality – and its treatment as crossing this threshold from a sexual perspective in light of the Video Law gives rise to a degree of confusion and a lack of uniformity among enforcement authorities, which obviously affect the entire legal apparatus that is meant to act toward the phenomenon's elimination. Indeed, the very lacuna present in the lack of the definition of online violence as a criminal offense makes it difficult for the Israel Police Force to take action over and above the problems associated with enforcement authority insofar as social network offenses are concerned. Dr. Kadman, the executive director of the Israel National Council for the Child, also called for a significant revision of existing legislation at another point during the same meeting, arguing that it was ill-suited to the new technological reality. *Id.* at 10. Dr. Kadman argued that the law cannot keep up with the new reality given that commercials that are banned from television are broadcast on the Internet instead.

criminalized, and behaviors that exert such severe harm on social values as to cross the threshold of criminality and thus merit criminalization.

In conclusion, and in order to highlight the importance inherent in the legal regulation of cyberbullying among children, it is worth quoting the following remarks made by Justice Amit in a decision delivered in March 2013 and concerning computer-mediated sexual offenses:

The case before us reveals the dark side of the web [...] the Internet penetrates real life, and poses real dangers in domains and manners unfathomable to our forefathers [...] *Little Red Riding Hood no longer passes through a forest teeming with wolves, but rather passes through virtual space*, where other kinds of hunters and predators lie in wait. In the past, a parent might have prevented her or his child from loitering in dangerous places or during dangerous times of day. This is no longer the case with today's parent, who finds it difficult to protect her or his children simply because danger awaits these minors in their own bedrooms and behind closed doors. *These are new dangers we are faced with, and the law must therefore adapt itself such as to be able to address the web's criminal subculture.*
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We therefore suggest the addition of a section to the Penal Law which would be attached to the Minority Section and entitled Virtual Domain Offenses of Expression Children, and which would provide the following:

- (a) An offense of expression committed in the virtual domain by a child should not be criminalized unless at least one of the following aggravating metrics – sexuality, intensity, or violence – have been satisfied.
- (b) A child is a minor up to the age of 18.

²²³ VPC 2065/2013, Anonymous Person v. The State of Israel, 3-4 (2013) (Isr.) (emphasis added).